A. I could not say that they would not be possible. I did not consider all possible means of development.

By Mr. Mather:

Q. Mr. Conger, do you know anything about the development of the river that has been made by the Northern Ohio Traction & Light Co. below Cuyahoga Falls?

A. I am not at all familiar with it.

Q. You know nothing about the location of the present dam which was built about two years ago or a year ago, nor about the steam plant, nor the hydro electric plant built by the Northern Ohio Traction & Light Company?

A. No; I heard that something was being done.

ALGER A. CONGER.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

(Here follow maps marked pp. 545 (omitted in printing) and 546.)

547–549 *Certificate to Depositions.—(Revised Statutes, Section 5280.)*

THE STATE OF NEW YORK,
New York County, ss:

I, Jessie MacLardy, a Notary Public in and for the County and State aforesaid, duly commissioned and qualified, Do Hereby Certify, that the above named Daniel R. Bacon and Alger A. Conger, were by me first severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the Depositions by them respectively subscribed as above set forth, were reduced to writing by* me, being a proper person and not interested in the action, in my presence, and in the presence of the witnesses respectively, and were subscribed by said witnesses, in my presence, and were taken at the time and place in the annexed Notice specified, and continued from day to day as above set forth.

I do further Certify that I am not a Relative or Attorney of either party, or otherwise interested in the event of this action.

In Witness Whereof, I have hereunto set my hand and Seal of Office, this 13th day of March, A. D. 1914.

[Seal Jessie MacLardy, Notary Public, Queens County, N. Y.]

JESSIE MACLARDY.

Cost Bill.

Writing Depositions, at 10 cts. per 100 words	$5.20
Issuing Subpœnas, 50 cents each	....
Swearing Witnesses, 4 cents each	8
Clerk's Certificate	....
Postage	54
	....
	....
	$5.82

Fees of .....Constable.

Service of	Subpœna	$.....
Mileage on	Subpœna	$.....
		$.....
		$.....

*If the depositions were written by the officer who certifies to the same, simply write "me" on this line, and strike out the words in bold face type that follow.

Witness Fees.

5 cents per day and 5 cents Traveling Fees, each mile, both ways.)
..... $.....

$.....

Total Costs of Taking Depositions.....$.....

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean.

Received of Cuyahoga River Power Co., the sum of $5.82 in full my fees, as above specified.

JESSIE MacLARDY.

0 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

P'T'FF'S EXHIBIT 21.

ATE OF OHIO,
Summit County, ss:

In Common Pleas Court.

No. —.

P't'ff's Exhibit 21.

C. R. P. Co.
vs.
N. O. R. Co.

A. M. W.

lydro-Electric Development on Cuyahoga River, Ohio, by H. von Schon, Cons. Engr.

Cuyahoga River Power Co., 1907-16 Hanover Bank Building, lew York.

51 H. von Schon, M. Am. Soc. C. E., Consulting Engineer, Detroit, Mich, Wayne Co. Bank Bldg.

December 29th, 1908.

Mr. W. R. Kimball, New York, N. Y.:

DEAR SIR: In accordance with your Commission for my report on the hydro-electric opportunity of the Cuyahoga river, Ohio, I have made such investigations, examinations and surveys as are required to determine the essentials, feasibility of development, power, output and cost, and I find that:

1. Development of water-power on the Cuyahoga river is feasible on a resourceful commercial scale, provided the flow is regulated;

2. Storage opportunities are available to realize close flow regulation;

3. Eight thousand electric horse-power can be developed for continuous service;

4. The cost of delivering this power at Cleveland or Akron approximates seven hundred thousand dollars.

The data, arguments, and conclusions upon which these findings are based form the subject of my following report.

Respectfully,

(Signed) H. von SCHON,
Consulting Engineer.

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Of the Treatment of the Report Subject.

subject of this report is the development of hydro-electric from the Cuyahoga river, Ohio, at or near the town of Cuya- Falls.

dro-electric power utilizes as the source of energy the weight of g water; the available quantity of water and the fall are the rceful power factors which are expressed as Flow and Fall. w originates from the rain and snow falling on that territory drains into the portion of the water course to be utilized; Fall difference of the elevations of the water surfaces at the points it is accumulated for the development and where it finds its after its energy is converted into useful work.

e method of development is the program which in this case is of Diversion, the water is to be conducted from its point of nulation by artificial channels and conduits to the lower point of available fall and there passed through hydraulic Turbines h generate mechanical power, this in turn is to be converted electrical energy by the aid of Generators; the resulting electric nt is to be transmitted to a distant point for power and light ce.

Of the Catchment Area.

he Catchment area which is to be utilized in this proposed er development is all that part of country which contributes he Cuyahoga river upstream of the Northern boundary of the of Cuyahoga Falls and to the Brandywine river upstream of settlement of Little York in Cuyahoga County, and this aggre- s about three hundred and fifty (350) square miles as measured n Government topographic plans. This area practically embraces he Drainage into the Big Cuyahoga river and into the Brandy- e which lies on the plateau rising some 600 feet above the level Lake Erie. It is lightly timbered, generally cultivated, the sur- being of soil and loam overlying clay and rock.

Of Precipitation.

Precipitation volume is expressed in inches of depth, that falling the Cuyahoga catchment area has been observed by the Govern- nt for many years at Akron, Hillhouse, Hiram, Hudson and w Berlin. A true copy of the monthly precipitation at these

points as reported by the Government from 1892-1905 appears in Appendix A.

The mean annual precipitation as computed from the records is plotted in Profile 1 (here omitted).

From this it appears that the normal annual is 38.48 inches, the lowest annual 31.93 inches, the highest annual 45.09 inches.

That during the period of seventeen years shown on the Profile 4 years were practically normal, 6 years low and 7 years high.

That, excepting in one case, a low or normal year was followed by a high; in the case of exception two low years, 1894 and 1895, occurred in succession.

That the difference between the Normal and Lowest year is from 38.48--31.93=6.55 inches.

Of Run Off.

A portion of precipitation is absorbed by vegetation, another sinks into the ground, a third flows immediately off the surface.

The first aggregates Evaporation, the second accumulates as Ground Storage and gradually feeds into the stream; the sum of the second and third forms the Run-off which is expressed in cubic feet per second of continuous flow.

Evaporation varies throughout the year being greatest during the growing, summer season and least during the replenishing, winter months; it is greater from water than land surfaces; in this latitude the former aggregates forty-eight inches per year, as deter-
555 mined from long period investigations, and the latter from (C. C. Vermeule, C. E. Vol. III, p. 325, State Geologist Report N. J., 1894):

$$E = (15.50 + 0.16\ R)\ (0.05\ T - 1.485)$$

where E is annual Evaporation,
" R " " Precipitation, 38.48 (normal),
" T " " Temperature (mean) 48°,

$$E = 15.50 + (0.16 \times 38.48) \times (0.05 \times 48) - 1.485.$$

and Evaporation is 19.82 inches or 0.515 of Precipitation.

Of the Flow.

The Flow of the Cuyahoga river has been measured by the Government for a continuous period of three years, Sept. 1903-July 1906, at Independence, Ohio, a point controlling a catchment area of 698 square miles, which is about double that herein considered. These measurements are of the daily height of the river stage and some 13 discharge measurements at various stages from which a Rating Table for the flow at all stages has been compiled by the Government.

A true copy of these gaugings and the rating table are attached hereto in Appendix B.

These measurements are the only available authentic flow data and would be conclusive of the actual conditions excepting for the

at the river is paralleled by the Ohio canal and that the flow canal is not included in the measurements. This canal is fed the Cuyahoga river at several points and its flow therefore ates in the catchment area tributary to the locus of the Gov- nt gauging point and should be added to that found by the rements in order to represent the entire run-off from the Cuya- iver Catchment Basin.

e canal flow was estimated by a Board of Government En- s in connection with investigations of canalization from Lake o the Ohio river; a copy of an extract from this report cover- is subject here follows:

> Extract from Report of Board of U. S. Engineers on Proposed Lake Erie-Ohio River Canal, as Quoted in 65th Annual Report of the Ohio Canal Commission 1903, page 67.
>
> *Basis of Expenditure of Water Supply.*
>
> he expenditure of water on canals falls under three heads:
>) That which escapes laterally from the canals, as from evap- on, filtration, leakage at structures, accidental causes and for te use when the water so taken is not returned to the canal.
>) That which is required to maintain the necessary current igh the canal caused by lockage, leakage at gates, and for private when the water abstracted is immediately returned to a lower
>
>) That required to fill the canal prism at the opening of navi- n.
>
> he expenditure under the first head (except for evaporation) assumed by the Government Engineers in their estimates for a l 7 feet in depth by 70 feet in width at water line to be at the of 100 cubic feet per mile per minute, or an average, for the e season, except on the summit levels, where it was assumed to be eet. The loss from exaporation, in addition to the above, was as- ed (Fitzgerald's tables) to be 35.75 inches for the nine months avigation."

he Canal section spoken of in this report exceeds that of the ent Ohio canal, its width being 50 and depth 5 feet, but this not affect the flow materially.

The length of the Canal section which is fed from the Cuyahoga r upstream of the measuring point is about 30 miles, and the mated Canal supply, evaporation excluded, is therefore 100 × = 3,000 minute or 50 second feet, and this volume should be ed to that found by the Government flow measurements as it is lent that the Canal supply is independent of the flow fluctuations he river.

The monthly mean flow during the period covered by the Gov- ment measurements, with Canal allowance added, is given on bles 1 as Run-off and Flow; the Brandywine area is credited with same Run-off ratio.

557 TABLE 1.

Monthly Flow of Cuyahoga River, Ohio.

In Cubic Feet per Second per Square Mile of Watershed, from Stream Measurements made by the U. S. Geological Survey.

Year.	1903.	1904.	1905.	1906.
January	....	2.19	0.88	1.04
	....	766	308	364
February	....	4.52	0.61	0.75
	....	1576	231	262
March	....	4.09	3.0	1.54
	....	1431	1050	539
April	....	2.48	0.99	1.13
	....	968	341	395
May	....	1.51	1.20	0.58
	....	528	420	203
June	....	1.70	0.90	0.37
	....	595	315	129
July	....	0.92	0.84	0.37
	....	322	294	129
August	....	0.54	0.71	....
	....	189	248	....
September	....	0.27	0.83	....
	....	94	290	....
October	0.82	0.29	0.80	....
	287	101	280	....
November	0.64	0.29	0.96	....
	224	101	336	....
December	0.84	0.66	1.23	....
	294	231	430	....
Annual mean	....	1.62	1.08	....
	....	575	378	....

1904 River Flow obstructed by ice gorge during February and March.
Light figures give mean Run-off in cub. sec. ft. per sq. mile.
Heavy figures give mean Flow in cub. sec. ft. from Catchment basin of 350 sq. Miles.

558 It may be proper to state here that the withdrawal of the supply now available for Canal feeding from the Run-off yielded by the 350 square miles area to be utilized by this development will in no wise diminish the needed Canal supply as the remaining 348 square miles catchment area, largely made up of the Little Cuyahoga river and a Canal feeder reservoir located on this latter stream above the city of Akron, Ohio, remain available for such supply. *supply.*

The following Flow data are taken from Table 1.

Year.	Months.	Total.	Monthly. Max.	Monthly. Min.	Mean.	Mean. Run-off.
1903	3	805	294	224	268	0.77
1904	12*	5,399	968	94	450	1.29
1905	12	4,543	1,050	231	378	1.08
1906	7	2,021	539	129	289	0.82
	34	12,768			375	1.07

* Flow of February and March, 1904, is half of that given on Table 1 to compensate for ice gorge conditions.

Of Storage.

ecipitation volume is expressed in inches of Catchment area for ontinuous period of day or month.

ie inch Precipitation on one square mile of territory equals oximately two and one-third million cubic feet and distributed ng one day, from

$$\frac{2.323000}{86400 \text{ (seconds in 24 hours)}} = 26.9 \text{ cub. sec. ft.}$$

in a 28 day month = 0.96 cubic second feet,
in a 30 day month = 0.90 cubic second feet,
in a 31 day month = 0.87 cubic second feet.

One foot of water covering one acre of surface represents a water volume of one acre-foot.

vaporation from water surfaces in this latitude aggregates about y-eight inches and may be taken, for the purpose of this discus-, as a monthly mean of one-third of an acre-foot from one acre

un-off of one cubic second foot from one square mile of Catch-t area for one day aggregates two acre-feet and for

a month of 29 days less evaporation 57.66 acre-feet,
a month of 30 days less evaporation 59.66 acre-feet,
a month of 31 days less evaporation 61.66 acre-feet.

eepage and Leakage from Storage Reservoirs cannot be deter-ned; ten per cent of stored volume is a large allowance in the itory under consideration where material is generally impervious overlying rock ledge. With this deduction the storage volume umulated from a Run-off of one cubic second foot from one mile rea in

a month of 29 days becomes 52 acre-feet,
a month of 30 days becomes 54 acre-feet,
a month of 31 days becomes 57.5 acre-feet.

e volume of one acre-foot, 43560 cubic feet, represents a con-uous 24-hour flow of one-half cubic second foot.

Of Filling Up and Drawing from Storage.

Ex. 1. If a Reservoir of 10,000 acre-feet capacity is to be filled in e month of 30 days from a Catchment area, tributary to the servoir, of 150 square miles, the available Run-off must be from

$$\frac{10000}{54 \times 150} = 1.24 \text{ cubic second feet.}$$

560 Ex. 2. If a Run-off of 0.80 cubic second feet from a Drainage area of 150 square miles is to be stored during a month of 31 days, the required Storage capacity is from

$$\frac{150 \times 57.5}{0.80} = 10781 \text{ acre-feet.}$$

Ex. 3. If a continuous flow of 200 cubic second feet is to be drawn for one month of 30 days the available Storage must be from

$$54 \times 200 = 10800 \text{ acre-feet.}$$

Of the Flow Argument.

This argument from which conclusions as to the available power flow are drawn accepts the feasibility of utilizing practically the entire annual Run-off by storing the available surplus of the high and replenishing the deficient Run-off whether for the period of a day or a month. In this connection no valuable evidence can be secured from the investigation of the daily or monthly fluctuations, those presented by the year only are essential; nor need the discussion concern itself with the years of high flow but is confined to those of normal and low; and lastly it should be principally of that period for which the facts regarding flow conditions are known.

The characteristics of the normal years 1904 and 1905 covered by the Government measurements, and of the lowest Precipitation year of record (1900) are analyzed on Table 2.

561 TABLE 2.

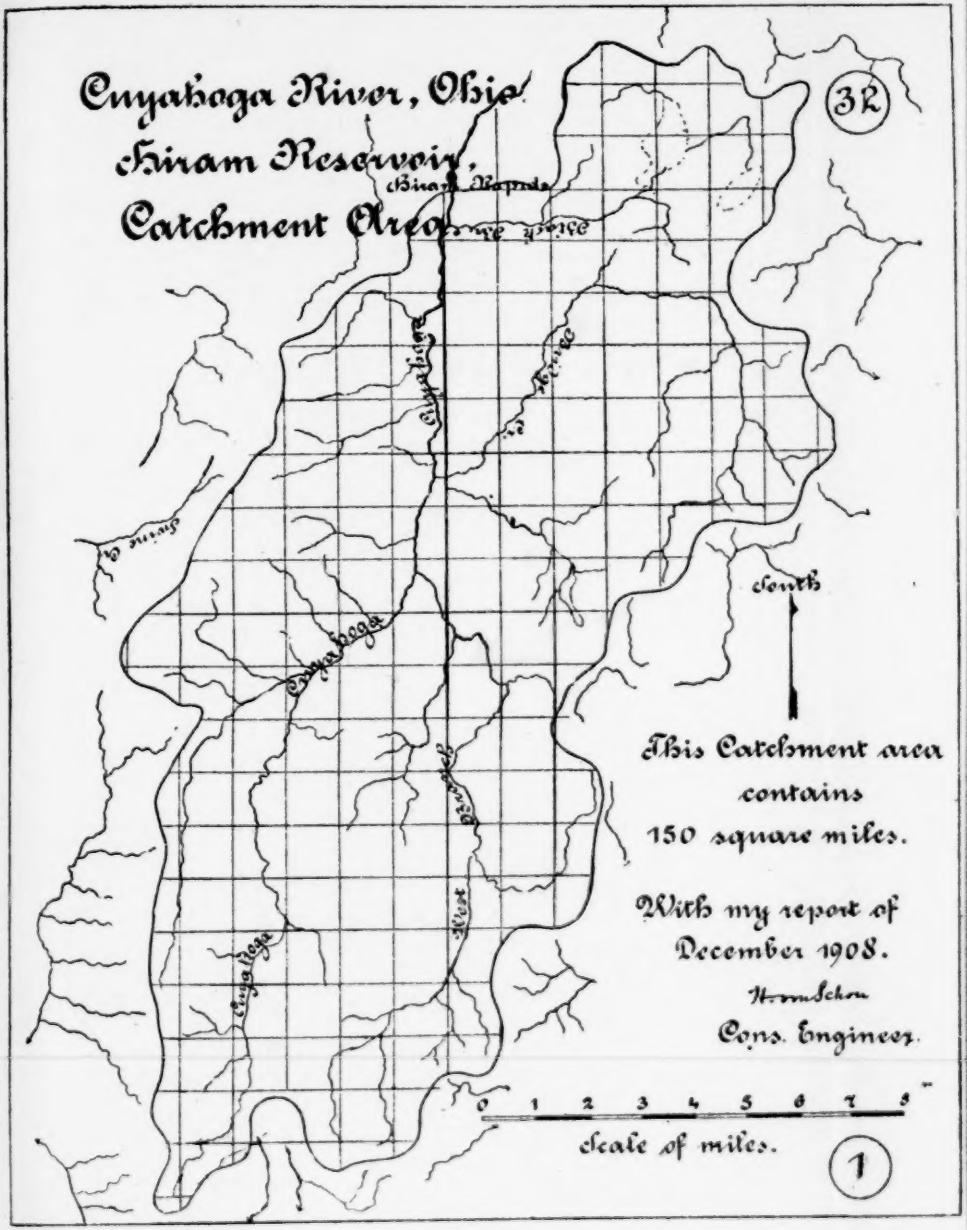
Analysis of Precipitation, Evaporation and Run-off for Normal and Low Years.

1904.	Prec.	Evap.	
Dec. '03-May '04.....	23-51	3.55	Replenishing season.
June-Nov. '04.....	16-00	20.30	Growing season.
	39-51	23.85	

Run-off 15.66″ = 1.122 c. sec. ft.
Flow from above 392 cubic second feet.
Flow from measurements 575 cubic second feet.

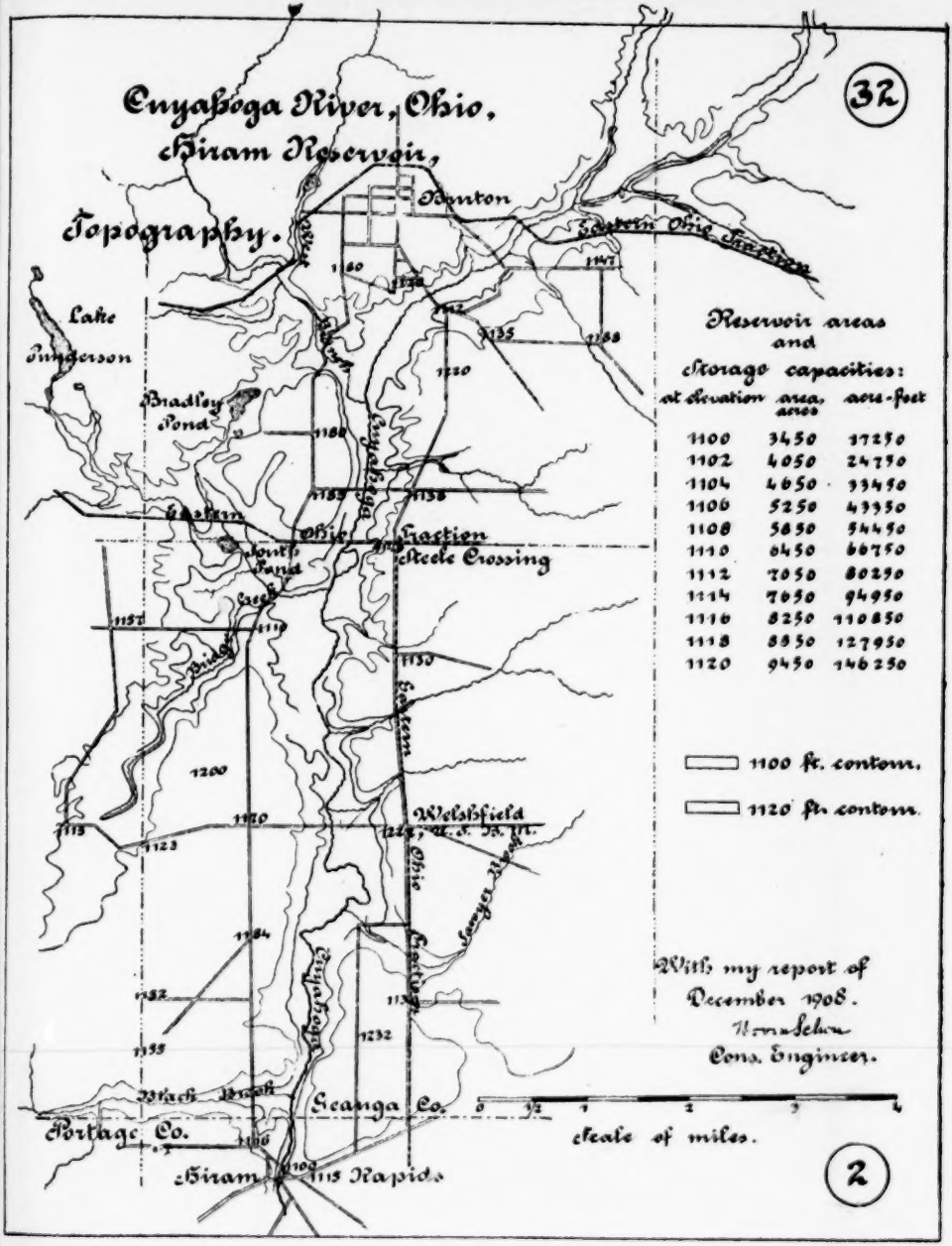
1905.		
Dec. '04-May '05.....	16.61	3.15
June-Nov. '05.....	24.41	22.65
	41.02	25.80

Run-off 15.22 = 1.1121 c. sec. ft.
Flow from above 389 cubic second feet.
Flow from measurements 378 cubic second feet.



12

No 3142
Cuyahoga River Power Co.
D564



No. 32.

Cuyahoga River Power Co.

1900.		
Dec. '99-May '00.....	14.34	3.00
June-Nov. '00.....	18.99	21.00
	33.33	24.00

Run-off $9.33'' = 0.687$ c. sec. ft.
Flow 240 cubic second feet.

Evaporation during replenishing season $= (4.30 + 0.12\ R) \times$
).05 T-1.48).
Evaporation during growing season $= (11.30 + 0.20\ R) \times$
).05 T-1.48).
Temperature during replenishing season was 39° appr.
Temperature during growing season was 58° appr.

(Here follow diagrams marked pages 562 and 563.)

564 From Table 2 appears:

First, that Run-off is not a fixed ratio of Precipitation cause of the fluctuating values of Evaporation during the season, ing much greater while demands of vegetation are met; therefore two years of equal annual Precipitation the monthly distributi may be such that the Run-off differs considerably.

This is well illustrated by the two normal years 1904 and 19 Precipitation in 1904 is one and a half inch greater but Run-off practically as in 1905.

Second, that the flow measurements for 1904 are of no value sin they give 50 per cent more flow though Precipitation was less. T is fully accounted for by the ice gorge in February and March wh maintained a high river stage at the measuring point above gorge but not a corresponding flow.

Third, that the measurement results for 1905, with Canal fl added, agree closely with Evaporation deductions and may be cepted as substantially correct.

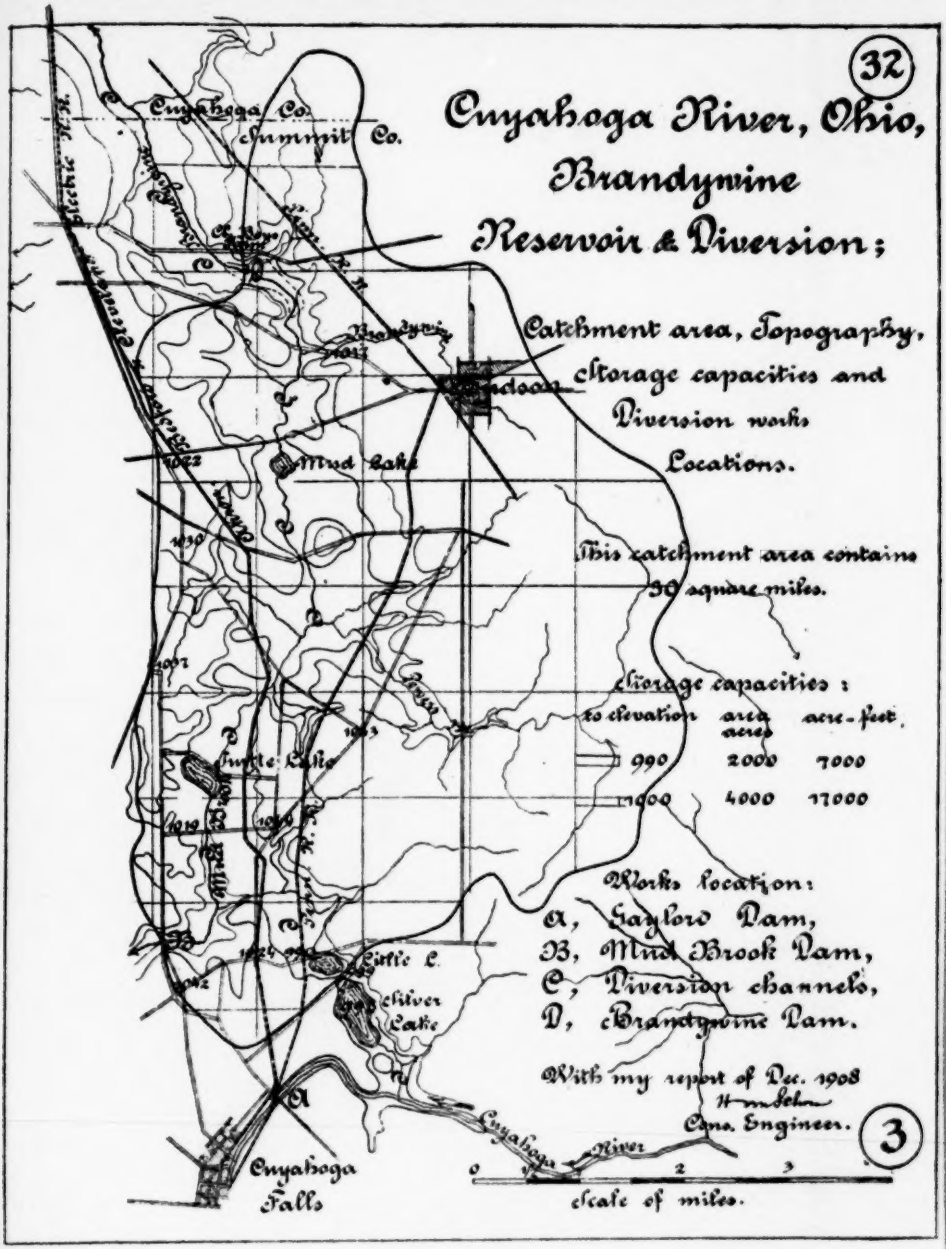
Fourth, that the Normal year mean flow is 378 cubic second fe
the Lowest year mean flow is 240 cubic second fe
the mean of these two is 309 cubic second feet.

Of Available Storage.

Plan 1 shows the area draining into the upper reach of t Cuyahoga river above the settlement of Hiram Springs, it conta one hundred and fifty square miles.

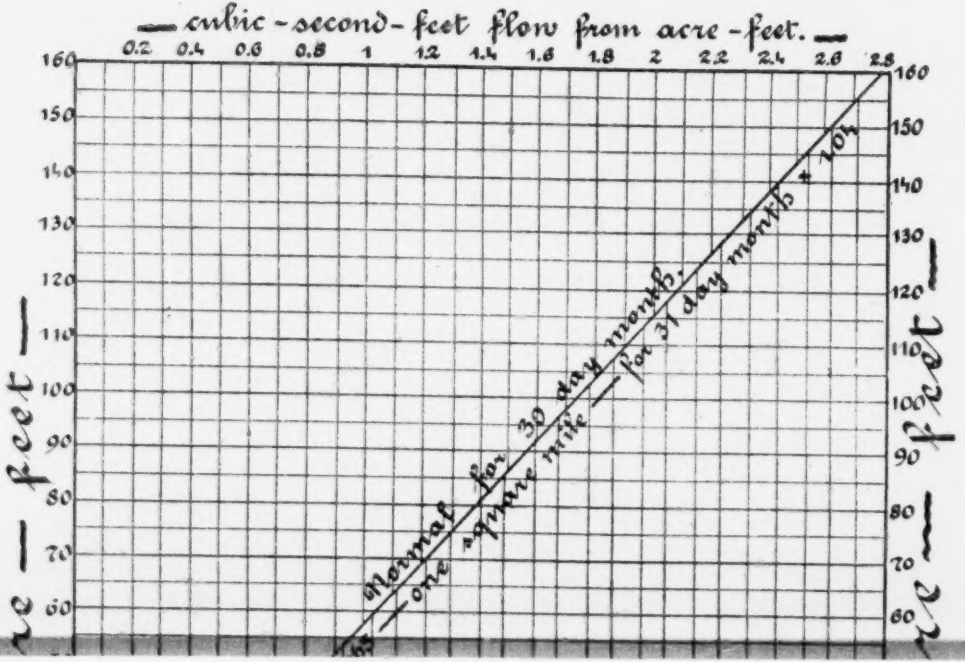
From Hiram Springs to the town of Burton northerly, a dista of eight miles, a natural basin is formed by a depression from to 2 miles in width; the river passes through at a general elevati of about 1090 feet above sea level, the basin surface rises sligh above this and is generally flat, but it is surrounded by a range hills rising to elevation of 1,200 feet and higher with no ou excepting where the Cuyahoga leaves it at its Southern extrem and at this point the hills approach each other within 500 feet elevation of 1,120 feet.

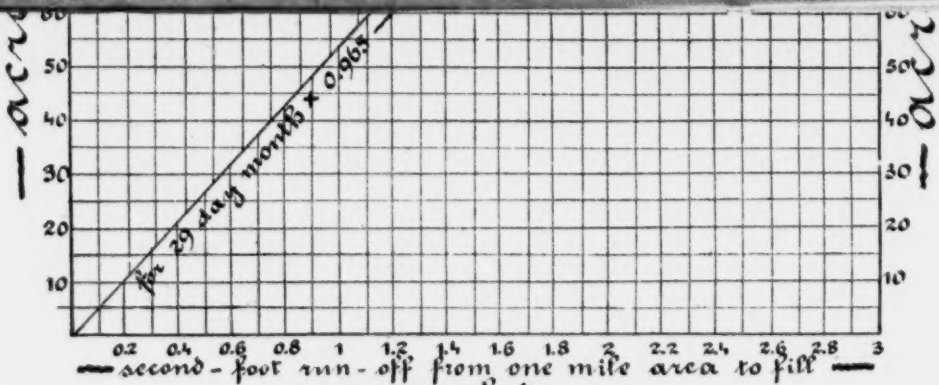
(Here follows diagram marked page 565.)



No. 312.
Cuyahoga River Power Co
D 565.

Storage Diagram.


— cubic-second-feet flow from acre-feet. —
0.2 0.4 0.6 0.8 1 1.2 1.4 1.6 1.8 2 2.2 2.4 2.6 2.8
160 150 140 130 120 110 100 90 80 70 60
— feet —
Normal for 30 day months.
— one square mile —
for 31 day months = 1.04


— acre
50
40
30
20
10
for 29 day months x 0.965
0.2 0.4 0.6 0.8 1 1.2 1.4 1.6 1.8 2 2.2 2.4 2.6 2.8 3
— second - foot run - off from one mile area to fill —
— acre - feet. —

Computed by B. von Schon,
Cons. Engineer, Detroit, Mich.

17

No. 342.

Cuyahoga River Power Co
v.
Northern Realty Co
} D 567.

66 Plan 2 is of this natural Reservoir site giving its topography as taken from U. S. plans from which the Storage capacities, t the different elevations, appearing thereon have been computed. The perfection of this natural reservoir cannot be exaggerated nd it may be adapted to the needs of water storage for the project erein dealt with with a degree of completeness depending only pon operation details.

Plan 3 is of a second natural Reservoir site, from U. S. Govern- ient plans, the valley of Mud Brook and the Brandywine, the first tributary of the Cuyahoga river emptying into it below the town f Cuyahoga Falls, the second also of the Cuyahoga Catchment asin but empties into the river some fifteen miles downstream of he City of Akron. This valley runs generally North and South, Iud Brook passing out of its Southern and the Brandywine out of he Northern end, both of them having a natural connection near he center, though each has a perceptible fall in the direction of its estination. These water courses leave the basin at about elevation 80 feet above the sea level, the basin rising to 990 near the center, nd is surrounded by ridges rising to elevation 1,020 feet and igher with no outlets excepting by these two streams. The Storage apacities of this, the Brandywine Reservoir, are not large, but epresent an available factor in the project.

This Reservoir receives the run-off of the entire 350 square miles f catchment basin.

Of Available Power Flow.

With the conclusions drawn from the Flow argument, the facts nown of the normal and low year, and of available storage apacities, the final determination of the available Power Flow is a ogical sequence.

The Storage Diagram gives equivalents of Run-off to Storage fill s well as of Flow supply and Storage volumes, and from this and he flow data for any year a Storage Program can readily be pre- ared which will conserve the entire available annual flow and istribute it at will. Table 3 gives such a program for the normal ear 1905 with the data of flow and available storage capacities, eretofore quoted, as a foundation.

(Here follows diagram marked p. 567.)

568

TABLE 3.

Storage Program for 1905.

Flow Regulated to 300 cub. sec. ft.; Hiram Reservoir Filed to elev. 1110 with 66750 A. F.

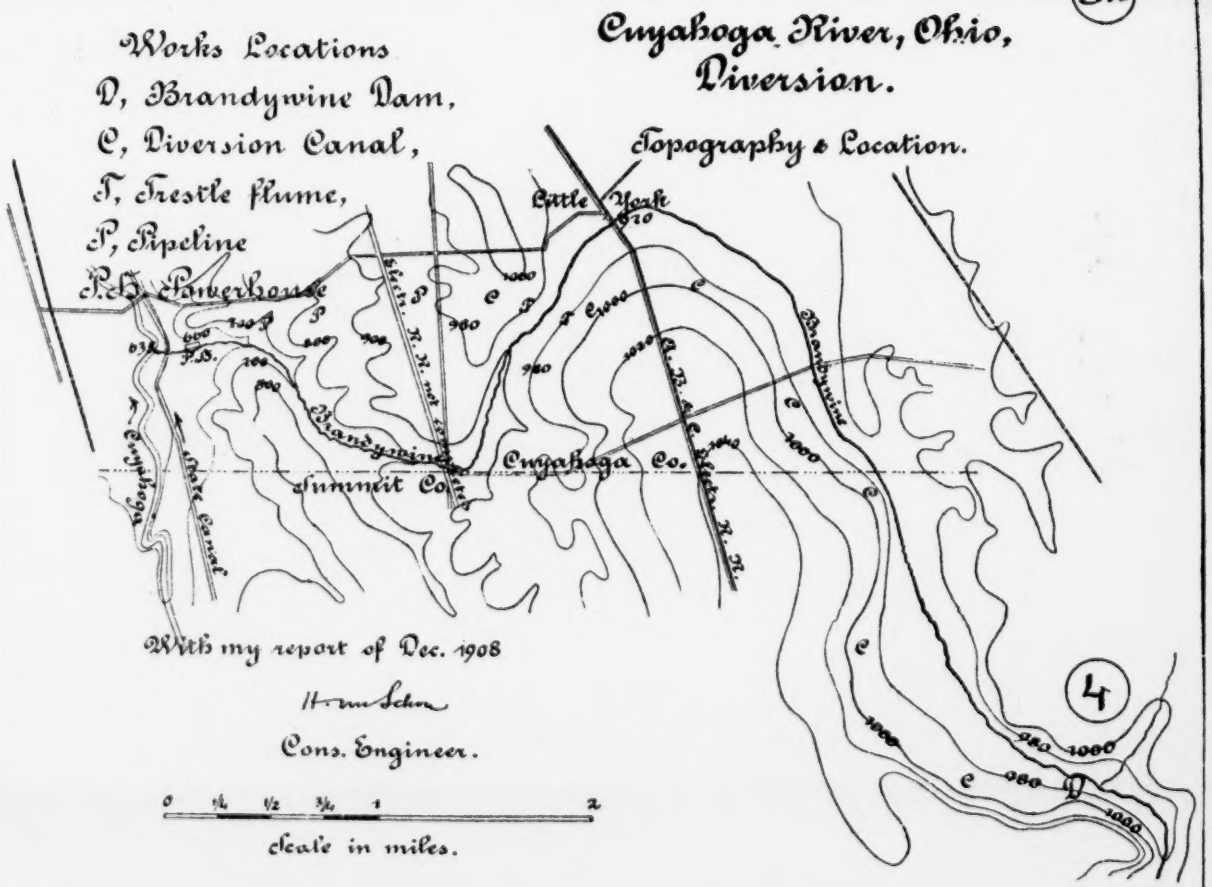
1	2	3	4	5	6	7	9	8	10
Month.	R. O.	Flow.	Surpl.	Def.	Store A. F.	From R. O.	Draw A. F.	A. F.	In store to elev.
January	0.88	308	8	none	480	0.1	none	67,230	1,110
February	0.61	231	none	69	none	...	4,180	63,050	1,109
March	3.00	1,050	750	none	24,900	3.0	none	87,950	1,113(1)
April	0.99	341	41	none	2,370	0.3	none	90,320	1,114(2)
May	1.20	420	120	none	7,100	0.9	none	97,420	1,114(3)
June	0.90	315	15	none	858	0.1	none	98,278	1,114(4)
July	0.84	294	none	6	none	...	340	97,938	1,114
August	0.71	248	none	52	none	...	3,082	94,856	1,114
September	0.83	290	none	10	none	...	570	94,286	1,114
October	0.80	280	none	20	none	...	1,200	93,086	1,114
November	0.96	336	36	none	2,050	0.25	none	95,136	1,114
December	1.23	430	130	none	7,700	...	none	102,836	1,115
					45,458		9,372		
						Bal. stored,	36,086		

(1) Surplus is 44,930 A. F. but R. O. of 30.0 sec. ft. fr. Hiram Catchment basin yields only 24,000 A. F. 20,930 A. F. may be stored in Brandywine.

(2) R O. of 0.3 sec. ft. from Hiram Drainage accumulates Surplus.
R. O. of 0.99 sec. ft. from remaining area of 200 sq. miles, plus R. O. of 0.66 from Hiram area furnishes 300 sec. ft.

(3 and 4) Same as No. 2.

R. O. is run-off; Def., deficiency; A. F. is acre-feet; elevations refer to Plan 2.



No 342.
Cuyahoga River Power Co
vs.
P. S. & C. Co.

20

FROM H. VON SCHON, CONSULTING HYDRO-ELECTRIC ENGINEER, DETROIT, MICH.

569 From this it appears that when starting with storage filled to elevation 1,110 (67,230 acre feet) the flow during 1905 could have been regulated to a constant of 300 cu. sec. ft. leaving at the end of the year over one hundred thousand acre feet stored, an excess of 36,000 over that at the beginning.

Supposing the next year was like that of 1900, the lowest of record, with a mean monthly flow of 240 cub. sec. ft. it would require a storage supply of 60 cub. sec. ft. or 41,000 acre-feet for the year and even then the Hiram Reservoir would still contain 60,000 acre feet; this program would therefore regulate the flow of one normal followed by one or two lowest years and still contain 20,000 acre feet. It appears, therefore, to be entirely feasible to restrict storage to elevation of 1,112 ft. and maintain a constant flow of three hundred cubic second feet without calling into requisition any of the available storage in the Brandywine Reservoir.

Of Flow Conclusions.

Before leaving this subject, and in view of the great importance of the conclusions drawn as regards the commercial merit of this project, I wish to emphasize that the argument is based solely upon known facts, that the conclusions may err only on the side of safety. The 1905 flow is evidenced by the physical measurements and the deductions from evaporation values, the addition to Government totals for Canal flow is fully justified by the findings of the official board; the Reservoir existence is a substantial fact, its capacity is based upon the topography of the Government maps; excess allowances are made for evaporation losses from storage. From all these the result is evolved without the necessity of making a single estimate or assumption.

Of the Fall.

The topographical details of the Government maps are conclusive as to this topic. The outlet of the Brandywine Reservoir site, whence the water is to be diverted for this development, as will appear in greater detail under Development Program, is at elevation

(Here follows diagram marked page 570.)

571 985 ft. and can be readily raised to 990 feet as appears fro
the topography on Plan 3; this constitutes the Upper leve
The elevation of the Cuyahoga river at the mouth of the Brandy
wine, which is the point at which the water is to be returned, is
elevation 635 ft., as given on Government plans and verified b
me by a line of levels from the Government Bench mark on th
abutment of the Cuyahoga river bridge at New Boston to the mout
of the Brandywine: this is the objective Lower Level, and th
Physical Fall is from 990-635 = 355 feet.

This will be subject to some losses hereinafter noted.

Of the Development Program.

Item 1. A Reservoir Dam is to be constructed at the South en
of the Hiram Reservoir site.

Item 2. Thence the water is to be taken down its natural chann
to the town of Cuyahoga Falls where a Dam is to be erected belo
the Gaylord bridge at the Northern boundary of Cuyahoga Falls
this is to be raised to elevation 993 ft. Its location is marked o
Plan 3 by the letter "A."

Item 3. A channel is to be cut from Cuyahoga river, about
miles above the Gaylord Dam, to connect with Silver Lake, whos
surface elevation is now about 993 feet.

Item 4. Silver and Little Lakes are to be connected by a channe

Item 5. A canal is to be cut from Little Lake to the Mud Broo
channel.

Item 6. Mud Brook is to be closed by a Dam "B" above Iro
bridge crossing, also rising to elevation of 993 feet.

Item 7. Mud Brook and Brandywine channels are to be widene
to the North end of the Brandywine basin; considerable of th
work is now being done by Summit County for the purpose of crea
ing more perfect drainage for the adjacent bottom lands, and i
this connection the cost of dredging and trenching in that countr
is readily established and is referred to under Estimates.

Item 8. Brandywine basin is to be closed by a Dam "D" to b
located near the Cleveland Boys' Home Farm, rising to the sam
elevation of 993 ft.

572 Item 9. A canal is to be cut from the Brandywine Da
following the 995-foot contour, passing Little York bridg
on the south and terminating at the Brandywine defile about a thi
of a mile West of Little York.

Item 10. A Flume is to be constructed across the Brandywin
gorge.

Item 11. A Canal is to be cut from the Brandywine ravine ha
a mile westerly to the first North and South road West of Litt
York and there to terminate in a Bulkhead.

Item 12. A pipe line is to be laid from this canal Bulkhead dow
the incline to a point on the Brandywine five hundred feet east
the State Canal.

Item 13. A Power Station is to be erected at this point whe
the pipe line terminates.

Item 14. The Brandywine is to be widened and deepened from this point to its junction with the Cuyahoga river.

Item 15. The present culvert by which the Brandywine passes under the State Canal is to be enlarged.

Item 16. A Transmission line is to be constructed to the market point.

Of the Structural Types.

The Dam Structures estimated on are of the Concrete-steel Reservoir-bulkhead types; the conditions are most favorable for this class of structure, all foundations going to Rock ledge which is near the surface. These are absolutely permanent, will require no repairs and do not exceed the cost of any other. All of these are to be provided with steel plate sluice gates operated by hand power.

Canals are of a section to pass the flow at a velocity not exceeding one and a half feet per second, side slopes are two in one, the prism is unlined as the imperviousness of the material guarantees against undue leakage.

The Flume across the Brandywine gorge is a concrete-steel conduit supported on steel columns.

The Canal terminal bulkhead is of concrete-steel with valve gates.

The Pipe line is of steel-plate riveted pipe bedded in trench.

The volume to be conducted aggregates 300 cu. second feet.

573 The flow characteristics of various size pipes are shown in:

Table 4—Pipe Characteristics.

Diameter in inches.	Flow capacity in cub. sec. ft.	Velocity in ft. per sec.	Friction head in feet per 1,000 ft. pipe.
60	154.7	7.88	4.19
66	154.7	6.51	2.62
72	154.7	5.47	1.72
78	150	4.52	1.09

From the above it appears that the 78-inch pipe is the most recommendable for this case; two such lines are required. The loss of head due to friction being for total length of 6,500 feet from $6{,}500 \times 1.09 = 7.08$ feet.

Wood stave pipes are the only other economical conduit which could be utilized for a distance of 4,000 feet lying within the pressure head limit of 200 feet, which is the safe capacity of this type. The cost of these would, however, considerably exceed that of steel plate pipes.

The Power Station is a concrete-steel structure with steel roof; of ample dimensions to install the equipment and provide for convenient operations. It is founded on rock ledge and is a fire-proof structure.

The State Canal Culvert is of concrete-steel.

The Transmission line is of timber poles set 120 feet centers.

Of the Estimates.

The Estimates are based upon the following unit values for material and labor:

Cement, Portland, delivered, per barrel	$1.25
Dredging (no rock), per cubic yard	.12
McGowan Bros., of Akron, O., are now executing contract in that section at 10c.	
Excavating Rock, per cubic yard	.65
Now being done for County at 58c.	
574 Excavating Earth, per cubic yard	.15
John O'Neil, of Akron, O., is now executing contract in that section at 13½c.	
Filling material in place, per cubic yard	.15
With power diggers from adjacent borrow pits.	
Gravel, delivered	.50
Labor, common	1.75
Labor, skilled	3.50
Lumber for forming p. 1,000 ft. b. m. delivered	30.00
Sand, per cub. yard, delivered	0.50
Steel, re-enforcing, delivered, per lb	0.03
Steel, structural, erected and painted, per ton	120.00
Team work, per day	3.75
Timber for form frames, false works, p. 1,000 f. b. m.	25.00

Equipment:

Gates, steel hoist, with operating gear, per square foot area	100.00
Pipe, steel plate riveted per foot length, 15c. p. 100 weight for freight and delivery from quotation by the Wm. B. Pollock Co., of Youngstown, O., Dec. 15, 1908:	
78″ diameter ½″ plate per lin. foot	11.25
78″ diameter 5-16″ plate per lin. foot	7.65
78″ diameter ¼″ plate per lin. foot	6.85
Relief Valves, old quotation, delivered	1,500.00
Hydraulic Turbines with Governors, Pressure Regulators and Draft Tubes, and Electric Generators with Exciters, all covered by proposal of the Allis-Chalmers Company of Dec. 17, '08, f. o. b. cars Milwaukee	65,900.00
Freight and delivery on same at 15c. p. 100, total wgt. 455,000 lbs.	685.00
Transmission line, per mile	3,000.00
Transformers (old quotation) p. kilowatt	5.00

Concrete manufactured and placed, based upon quoted unit prices and the employment of batch mixers and power conveyors.

75 X Concrete—Monolithic, without forming 1-3-6:

ne barrel cement	$1.25	
½ yard sand	0.25	
yard gravel	0.50	
lixing	0.35	
Conveying	0.25	
Placing and ramming	0.25	2.85
Profit of 15%		.43
		$3.28

X F Concrete—Monolithic, formed, 1-3-6:

Add to X Concrete	$2.85	
Placing	0.25	
Forming	1.00	4.10
15% Profit		0.62
		$4.72

X X Concrete—Monolithic, formed, 1-2-4:

One and a half barrel cement	$1.88	
½ yard sand	0.25	
1 yard gravel	0.50	
Mixing	0.35	
Conveying	0.25	
Placing and ramming	0.75	
Forming	1.00	4.98
15% Profit		0.75
		$5.73

X X S Concrete—Formed, 1-2-4 re-enforced with steel rods:

Add to X X Concrete	$4.98	
Placing steel rods	1.00	
Placing and ramming	0.25	6.23
15% Profit		.94
		$7.17

576 *Estimates for Roads and Bridges.*

Item 1. Hiram Reservoir:

Raising seven highway crossings.
20,000 feet of highway,
15 ft. wide mean height 8 feet, slopes 1½: 1, mean filling quantity 8 cub. yds.,
Fill of 160,000 cub. yds. at 0.15 ..... $24,000.00

Item 2. Raising two electric road beds:	
12,000 feet, 10 ft. wide, mean height 8 ft., mean filling quantity 7 cub. yds.,	
Fill of 84,000 cub. yds. at 0.15	12,600.00
Ballasting with gravel at 0.50 p. c. y. 5 ft. wide, 3" deep, 15,000 cub. yds	7,500.00
Item 3. Raising 14 bridges for mean height 8 ft.:	
Five crossing Cuyahoga river,	
Nine crossing tributary branches,	
Abutments 10′ wide, 10′ high, 3 ft. Concr., 22 cub. yds. per bridge,	
308 cub. yds. X F Concr. at 4.72	1,454.00
Excavation, 20 cub. yds. per bridge, 280 cub. yds. at 25c.	70.00
False works for raising bridges at 10.00	140.00
Item 4. Taking up and re-laying 12,000 ft. of electric road tracks at 2,500.00 per mile	5,625.00
Item 5. Taking down and replacing overhead construction, trolley and feed wires, 2¼ miles, at 1,500.00 per mile	3,375.00
Item 6. Brandywine and Terminal Diversion:	
Erecting 8 bridges crossing canals,	
One for steam railroad,	
Two for electric roads,	
Five for highways,	
577 Abutments and excavation as per Item 3, Per bridge, at 119.00	952.00
Steel plate girder bridges 10′ w. 30′ l. at 1,500.00, erected and painted	12,000.00
Item 7. Moving "Steele Crossing" Cemetery	1,000.00
Total Roads and Bridges	$68,716.00

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Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Hiram Reservoir Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,900.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	270.00
3.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete Spillway type	21	100	.....	.....	.....	.....	.....
	Dam contains 900 cub. yds. XX concrete	.....	.....	.....	900	c. ys.	$5.73	5,157.00
5.	Abutments: Concrete-steel buttressed type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 150 cubic yds. XXS concrete	.....	.....	.....	150	c. ys.	7.17	1,076.00
	Abutments contain 7,000 lbs. steel	.....	.....	.....	7,000	lbs.	.03	210.00
6.	Bulkheads: Concrete-steel	25/0	450	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	455	c. ys.	3.28	1,493.00
	Concrete, XXS	.....	.....	.....	393	c. ys.	7.17	2,818.00
	Steel, re-enforcing	.....	.....	.....	90,000	lbs.	.03	2,700.00
7.	Sluices and Gates: Two 8 x 10 sluice gates in Bulkhead	.....	.....	.....	.....	.....	.....	2,200.00
	Total	.....	.....	.....	.....	.....	.....	$17,954.00

578 *Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.*

Gaylord Bridge Dam.

Item.	Constructions and operations.	Dimensions.			Quantity.		Cost.	Amount.
		H.	L.	W.	Number.	Unit.		
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$4,100.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	220.00
3.	Foundation on rock ledge	.....	.....	.....	.....	.....	.....	.....
	Foundation concrete, none	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete type	10	100	.....	.....	.....	.....	.....
	Dam contains 315 cub. yds. XX concrete	.....	.....	.....	315	c. ys.	5.73	1,805.00
5.	Abutments: Concrete-steel type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 38 cub. yds. XXS concrete	.....	.....	.....	38	c. ys.	7.17	273.00
	Abutments contain 2,000 lbs. steel	.....	.....	.....	2,000	c. ys.	.03	60.00
6.	Embankments: None	.....	.....	.....	.....	.....	.....	.....
	Total	.....	.....	.....	.....	.....	.....	$6,458.00

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Mud Brook Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,800.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	240.00
32.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Monolithic Concrete Spillway type	20	50	.....	.....	.....	.....	.....
	Dam contains 400 cub. yds. XX concrete	.....	.....	.....	400	c. ys.	5.73	2,052.00
5.	Abutments: Concrete-steel type	.....	.....	.....	.....	.....	.....	.....
	Abutments contain 100 cub. yds. XXS concrete	.....	.....	.....	100	c. ys.	7.17	717.00
	Abutments contain 4,000 lbs. steel	.....	.....	.....	4,000	lbs.	.03	120.00
6.	Concrete-steel Bulkhead	20/0	1075	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	907	c. ys.	3.28	2,975.00
	Concrete, XXS	.....	.....	.....	920	c. ys.	7.17	6.597.00
	Steel, re-enforcing	.....	.....	.....	190,000	lbs.	.03	5,700.00
7.	Gates: Two 8 x 10 sluices in Bulkhead	.....	.....	.....	.....	.....	.....	2,200.00
	Total	.....	.....	.....	.....	.....	.....	$22,411.00

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Brandywine Dam and Embankments.

Item.	Constructions and operations.	Dimensions. H.	L.	W.	Quantity. Number.	Unit.	Cost.	Amount.
1.	Controlling flow during construction	.....	.....	.....	.....	.....	.....	$1,600.00
2.	Preparing river bed and banks	.....	.....	.....	.....	.....	.....	900.00
3.	Foundation on rock	.....	.....	.....	.....	.....	.....	.....
4.	Dam: Reservoir Concrete-steel Bulkhead, Item 6	.....	.....	.....	.....	.....	.....	.....
5.	Abutments: None required	.....	.....	.....	.....	.....	.....	.....
6.	Concrete steel Bulkhead	20/0	1400	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	780	c. ys.	$3.28	2,560.00
	Concrete, XXS	.....	.....	.....	785	c. ys.	7.17	5,630.00
	Steel, re-enforcing	.....	.....	.....	186,000	lbs.	.03	5,580.00
7.	Gates: Four 8 x 10 sluices in Bulkhead	.....	.....	.....	.....	.....	.....	4,400.00
	Total	.....	.....	.....	.....	.....	.....	$20,670.00

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River. Based on Surveys Made by H. von Schon, Cons. Engr.

Canal Pipe-line.

Item.	Constructions.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Channel: Section 200 ft. sq. slopes 2:1	.....	.....	.....	.....	.....	.....	.....
	Rock Excavation: 20% of whole	.....	.....	.....	44,040	c. ys.	$0.65	$28,624.00
	Earth Dredging: (See details below)	.....	.....	.....	176,160	c. ys.	.12	21,139.00
2.	Head Gates: In Dam Estimates	.....	.....	.....	.....	.....	.....	.....
3.	Canal Section 200 sq. ft. slopes 2:1	.....	.....	.....	.....	.....	.....	.....
	Rock Excavation: 20% of total	.....	.....	.....	71,060	c. ys.	.65	46,189.00
	Earth Excavation: (See details below)	.....	.....	.....	284,240	c. ys.	.15	42,636.00
4.	Pipe Line: Details below	.....	.....	.....	.....	.....	.....	.....
	Surfacing: Excavating 4'd—30-20	.....	.....	.....	26,000	c. ys.	.15	3,900.00
	Pipe Supports: Pipe in trench	.....	.....	.....	.....	.....	.....	.....
	Pipe: (Details below)	.....	.....	.....	.....	.....	.....	113,930.00
	Pipe laying, including field riveting, bedding and painting	.....	.....	.....	13,000	1. ft.	2.00	26,000.00
5.	Forebay: Concrete-steel "U" Bulkhead	15	70	.....	.....	.....	.....	.....
	Concrete, X	.....	.....	.....	60	c. ys.	3.28	197.00
	Concrete, XXS	.....	.....	.....	80	c. ys.	7.17	574.00
	Steel, re-enforced	.....	.....	.....	6,000	lbs.	.03	180.00
7.	Two Gate Valves in Bulkhead	78"	.....	.....	.....	.....	.....	3,000.00
8.	Bridges: See Roads and Bridges Estimate	.....	.....	.....	.....	.....	.....	.....
	Total	.....	.....	.....	.....	.....	.....	$286,369.00

Channel and canal sections.	Length. feet.	Dredging. cub. yds.	Excavating
Cuyahoga River-Silver Lake....	2,750	16,200	
Silver to Little Lake.....	800		20,800
Little Lake to Mud Brook.....	4,000		144,000
Mud Brook and Brandywine...	34,000	204,000	
Brandywine Dam to Trestle....	23,000		172,500
Trestle Crossing to Pipe Intake.	2,400		18,000
		220,200	353,300

Channel dredging quantity is 0.8 of full sections; rock is 20% of total.

Pipe line.	Length.	Thickness of plate.	
100 ft. head	2,200	¼ inch per ft.....	$6.85
200 ft. head	1,800	5-16 inch per ft.....	7.65
300 ft. head	1,700	½ inch per ft.....	11.25
350 ft. head	800	½ inch per ft.....	11.25

Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Flume Crossing Brandywine.

Item.	Constructions.	Dimensions. H.	L.	W.	Quantity. Number.	Unit.	Cost.	Amount.
1.	Flume: Section 150 sq. ft. (see below for details)	35/0	1200	.....	500			
	100 Footing, Concrete X	.....	.....	.....	2,700	c. ys.	$3.28	$1.640.00
	Conduit Concrete XXS	.....	.....	.....	75	c. ys.	7.17	19,360.00
	Struct. Steel	.....	.....	.....	.....	tons	120.00	9,000.00
	Total	.....	.....	.....	.....	.....	.....	$28,524.00

581 Trestle Flume Across Brandywine Defile.

Concrete steel conduit of 150 sq. ft. flow section supported by steel columns standing on concrete footings.

Trestle bents, 10 ft. c. s.
Trestle 500 feet long.
Conduit 1,200 feet long.
Columns of 8″ channel and plate at 40 lb. per l. ft.
Conduit Floor beams at 40 lb. per l. ft.
Conduit Roof ties 8″ channels 1.5 ft.

Approximate steel weight of Bent 3,000 lbs.

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Estimates for Development at Cuyahoga Falls, Ohio, on Cuyahoga River, Based on Surveys Made by H. von Schon, Cons. Engr.

Power Station.

Item.	Constructions.	Dimensions. H.	Dimensions. L.	Dimensions. W.	Quantity. Number.	Quantity. Unit.	Cost.	Amount.
1.	Foundation on Rock:							
	Rock excavation	10	75	50	1,400	c. ys.	$0.65	$910.00
	Foundation concrete, X	2	75	50	280	c. ys.	3.28	819.00
2.	Substructure:							
	End walls, concrete, XF, two	6	50	5	112	c. ys.	4.72	529.00
	Pit partition wall, concrete, steel, XXS	6	50	2	23	c. ys.	7.17	165.00
	Forebay wall, concrete, XF	6	75	5	84	c. ys.	4.72	
	Pit floor, concrete-steel (same as foundation concrete)	.....	.....	.....	.....	.....	.....	397.00
	Pit roof concrete-steel, XXS	2	75	50	280	c. ys.	7.17	2,008.00
3.	Turbine Chambres: Dry type.							
	Steel for Item 2 concrete	.....	.....	.....	14,000	lbs.	.03	420.00
	Steel supports for machinery	.....	.....	.....	10	tons	120.00	1,200.00
4.	Station Building:							
	Walls, concrete-steel	20	250	2	370	c. ys.	7.17	2,653.00
	Roof, steel	.....	.....	.....	15	tons	120.00	1,800.00
	Doors and windows	.....	.....	.....	.....	.....	.....	300.00
5.	Rock excavation for Discharge Bay	10	30	50	560	c. ys.	.65	364.00
	Concrete lining of Discharge Bay, XXS concrete	10	160	2	120	c. ys.	7.17	860.00
	Widening and deepening to section of 209 sq. ft. rock	.....	1300	.....	9,750	c. ys.	.65	6,340.00
	State Canal Culvert (see details below)	.....	.....	.....	.....	.....	.....	5,978.00
	Total	.....	.....	.....	.....	.....	.....	$24,743.00

Transverse walls, four.. 10 x 100 x 3 of XX	Concr. 445 yds. at 5.73	$2,550.00
Arched roof ..... 2 x 100 x 30 of XXS	Concr. 400 yds. at 7.17	2,868.00
Steel	12,000 lbs. at 0.03	360.00
False work		200.00
		$5,978.00

Estimate for Development at Cuyahoga Falls, Ohio, on Cuyahoga River.

Equipment.

Item.	Plant and installation.	Units.	Per.	Cost.	Amount.
1.	Hydraulic:				
	Water wheels, included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Governors for W. Ws., included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Draft tubes, included in Item 2 as per quotation of Allis-Chalmers Company of Dec. 17, 1908, in App. D.				
	Pipe-line receiver, 50 feet of 78" ¾" pipe closed at ends secured to foundation	.....	.....	.....	$1,300.00
	Valves	2	.....	$1,500.00	3,000.00
2.	Electric at Power Station:				
	As per quotation in App. D. incl. Turbines with delivery cost added at 15 cents per 100 lbs. and installing at $6,000.00	.....	.....	.....	72,582.00
	Switchboard and testing instruments	.....	.....	.....	12,000.00
3.	Electric Transmission:				
	Transformers, step up	6,000 K.W.	.....	5.00	30,000.00
	Pole line, 16 miles to Akron or Cleveland (details below)	.....	mile	2,817.00	45,072.00
	Sub-station at Akron or Cleveland	.....	.....	.....	5,000.00
	Transformers, step down	6,000 K.W.	.....	5.00	30,000.00
4.	Operating and Repair Tools and Material:				
	Sub-station switchboard and testing instruments	.....	.....	.....	12,000.00
	Total	.....	.....	.....	$210,954.00

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3 Transmission Line.

Fifty-foot poles, set 8 ft. deep, 120 ft. c. s. poles, delivered at 0.00; shaped, barked and painted at $2.00, set at $2.00—

em 1—Poles, per mile 44, at $14.00 ..... $560.00
Cross-arms, 3¾ x 4¾, 8 ft. long—
em 2—Two per pole, at $1.00 in place, per mile 88.00
Insulators, suspended high tension type—
em 3—Six per pole, at $1.50 in place 396.00
Conductor to transmit 6,000 K. W. at 60,000 Volt pres-re with 5% line loss in 15 miles from Circular M. M.

$$= \frac{15x5,\ 400x11xCurrent}{Loss} + 10\%$$

$$= \frac{}{3{,}000} + 10\%$$

$$= 891{,}000 \times 106$$
$$= 31{,}185 + 10\% = 34{,}303$$

em 4—No. 5 hard drawn Copper, 33,100 c. m.
Weight per 1,000 feet, 121 lbs.
Required six conductors (for double line).
One mile 5,400 x 6 = 32,400 = 3,920 lbs.
At mill price of 15c and delivery of 12c per 100 lbs. $593.00
em 5—Stringing conductors at $20.00 per pole 880.00
em 6—Guying poles, placing lighting arrestors, etc 300.00

Per mile $2,817.00

Of Power Output.

The weight of falling water is the source, one cubic foot of water ighs 62.5 lbs., ten cubic feet falling ten feet in one minute is an energy of 62.5x10x10=6,250 pounds.

4 The unit of work is a horse-power which represents an energy capable of lifting 33,000 lbs. one foot in one minute 550 lbs. one foot in one second; therefore the above energy of 50 foot pounds is in horse-power 6.250

$$\frac{}{550} = 11.3$$

The physical fall for this project is from:

Elevation of upper level at 993 feet, less
Elevation of lower level at 635 feet

358 feet

The upper level is the crest of the Gaylord Dam, being also the el of water in Silver and Little Lakes, which appears to be the itation due to proprietary conditions; the lower level is the nor-

mal water surface in Cuyahoga river at the mouth of the Brandywine and the passing of the water between these points requires a certain fall, as all flow is due to fall.

In the open channels from Cuyahoga the point of diversion from Cuyahoga river to the beginning of the Pipe line, the fall is expressed by Slope in fractions of a foot per linear foot of waterway. The value of Slope "S" depends upon the hydraulic radius $R = \frac{\text{flow area}}{\text{wetted perimeter}}$ and the condition of the perimeter, the bed and sides, as retarding the flow by friction, symbolized by "n," the co-efficient of friction.

"R" in this case is $\frac{200}{54}$ approximately 4.

"n" for unlined earth channels is 0.17.

"v" is the velocity of flow, in this case 1.5.

The formula from which Slope is found as evolved by H. M. Bazin is $R\,S = (a + \frac{b}{R})\,V^2$.

a and b are constants expressive of "n."

585 For present conditions a = 0.00085, b = 0.00035.

Therefore $S = (0.000085 + \frac{0.00035}{4})\frac{1.5^2}{4}$.

$= 0.000171 \times 0.56$

$= 0.000096$

Or for 1,000 feet of channel or canal	0.096	feet
And for the total length of 68,100 feet	6.54	feet
Flow in Pipe line also consumes fall; this aggregates (see page 29)	7.08	feet
Total loss of head from upper to lower level	13.62	feet
Which deducted from the available 358 ft. is	344.38	feet

the effective head, provided the tail-race is so dimensioned that the flow therein will not exceed one foot per second, it will be taken at three hundred and forty-four (344) feet.

The accepted power flow is 300 second feet, and the avilable energy therefore from $\frac{300 \times 62.5 \times 344}{550} = 11{,}727$ hydr. horse-power.

The actual power output (electric) is that due to the efficiencies of Turbines and Generators, for which 80% and 93% respectively may be realized, or $0.80 \times 0.93 = 74.4\%$, which is taken at 74%, and therefore

$11{,}727 \times 0.74 = 8{,}675$ electric H. P. generated.

The loss from this in transmission is 8%, 1.5 stepping up and the same stepping down and 5% in line, the delivered energy is therefore

$8{,}675 \times 0.92 = 7{,}981$ electric horse-power

or $7{,}981 \times 746 = 5{,}953$ kilowatt, delivered.

Of Operation Cost.

This plant will require for night and day service an operating personnel of

e superintendent, at	$1,800.00
Having immediate charge of sub-station and supervising the generating plant.	
o operators at generating station	2,400.00
e operator at sub-station, nights	1,200.00
ur assistants, at $900.00	3,600.00
o linemen, at $1,200.00	2,400.00
ree dam attendants, at $360.00	1,080.00
o pile line tenders, at $600.00	1,200.00
and waste	300.00
	$13,900.00

Estimate for Development at Cuyahoga Falls, Ohio.

Summary.

ads and bridges	$68,716.00	
ms and embankments	67,493.00	
nal, flume, pipe line	314,893.00	
wer station	24,743.00	
uipment	210,954.00	686,799.00
gineering, 2½% (see below for detail)	.....	$17,170.00
Total		$703,969.00
st of E. H. P. delivered at Cleveland or Akron, Ohio (7,981)	88.21	

ansmission loss taken at 8%.

Annual Investment Balance.

ve per cent interest on bond issue of $1,000,000.00	$50,000.00	
demption Fund charge at 2%	20,000.00	
preciation at 2% of construction, $475,000.00	9,515.00	
preciation at 5% of equipment, $211,000.00	10,550.00	
erating power plant detail on page —)	13,900.00	
xes, 2% on valuation of $500,000.00	10,000.00	
dministration, officers of company, traveling, etc	10,000.00	
lue of output at $30.00 per E. H. P. per year (7,981)	.....	239,430.00
Surplus balance	115,385.00	

587 Engineering.

H. von Schon, Cons. Engr., will contract to do all the Engineering for two and one-half per cent of the estimated or contract cost of all works and equipment, such Engineering services to consist of:

Item 1—Making final surveys for plans and location of works, areas of storage and flowage, and borings on all locations.
Item 2—Preparing contract Plans and Specifications.
Item 3—Securing construction contract.
Item 4—Employing for general superintendence one resident engineer, and such concrete, steel pipe, mechanical and electrical inspectors as are required to closely inspect every construction and equipment operation.
Item 5—Reporting monthly on progress and cost of work to the Company.
Item 6—Testing material, equipment and completed plant. This proposal is based upon one year's construction period, during which the plant can readily be completed.

Of the Power Market.

This development would be about 16 miles from Akron, Ohio, and the same distance from Cleveland, Ohio, both cities consuming large amounts of electric current for lighting and power services.

The electric road system is also very extensive, to most of which the power plant will be central.

I have not made a detail canvass of either market point, as it is well known that Akron uses from three to four times and Cleveland probably eight times of the proposed output.

The power rates charged at Akron are from 3 cents per kilowatt hour up; at Cleveland the larger consumers obtain current at two cents. The Traction Companies claim to manufacture current at one cent.

588 *Table 5 of Kilowatt Hour and Horse-power Year Equivalents on the Basis of One Cent per Kilowatt Hour.*

Per day.	Hours of service per year.	Dollars per year for Elec. H. P.
Ten	3,000	$23.08
Seventeen	6,205	47.73
Twenty-two	6,600	50.78

Ten-hour is the service to industrial plants.
Seventeen to traction companies.
Twenty-two to continually operating mills.
This is for full 100% consumption.

From this it appears that if current were sold to the lowest price consumer, traction service, and the load factor, the per cent of actual current of the whole doing work, were put at 75% with a rate of one

er cent per kilowatt hour, that the annual revenue per horse-power ould be from $47.73 \times 0.75 = \$35.94$,

Or if the entire output at 100% load factor were disposed of to ny or several of the present power generating concerns at one cent er kilowatt hour, the annual revenue per horse-power would be bout fifty dollars.

To analyze the probable revenue from retail values for miscella- eous light and power current service would also necessitate the dding to estimates for distribution plant and equipment, and the ecessary operating personnel, which would require a special report.

It seems probable that the most resourceful disposition of this utput lies in selling it to present central power plants, and either kron or Cleveland affords ample market.

Of Supplemental Power Developments.

The elevation of the Hiram Reservoir Dam is 1,113 feet, that of the Gaylord Dam 993 feet, and there is therefore a fall of 120 feet between these two points, some of which may be developed.

589 The tributary Drainage area is 150 square miles at the Hiram Dam with a flow, at the Run-off, which is to be sus-

ained, of $\frac{300}{350} = 0.857$ cub. sec. feet per square mile; this is a power low of 128 cubic feet. The fall at the Hiram Dam is 1,113 — 1,090 = 23 feet, and a development at the dam would ield an output of 246 electric horse-power, which could probably e marketed at Hiram Spring and Mantua.

The cost of the Hiram development (dam having been charged to the Primary) is:

For power house	$4,000.00
For equipment	7,500.00
	$11,500.00

or per electric horse-power generated, 46.75.

The town of Kent is 16 miles down stream from the Hiram dam: the tributary catchment basin here is about 280 sq. miles, the power flow 240 cubic feet.

There is a dam at Kent 18 feet high; the power output here would he 396 electric horse-power, which could probably be marketed in Kent.

The cost of this development, the dam being serviceable, would be:

For power house	$5,000.00
For equipment	11,900.00
	$16,900.00

or per electric horse-power generated, 42.68.

The next dam on the river is at Munroe Falls which will practically be drowned by the proposed Gaylord dam and therefore the

development at the Hiarm dam of 246 E. H. P. and the development at the Kent dam of 396 E. H. P., a total of 642 E. H. P., is the sum of the feasible supplemental developments.

This completes my report.

H. VON SCHON,
Consulting Engineer.

[Endorsed:] Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

590 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

State of Ohio, Summit County, *ss.* In Common Pleas Court. No. —. P't'ffs Exhibit 22. C. R. P. Co. vs. N. O. R. Co. A. M. W.

591 The Northern Ohio Traction & Light Company.

PL'T'F EXHIBIT 22.

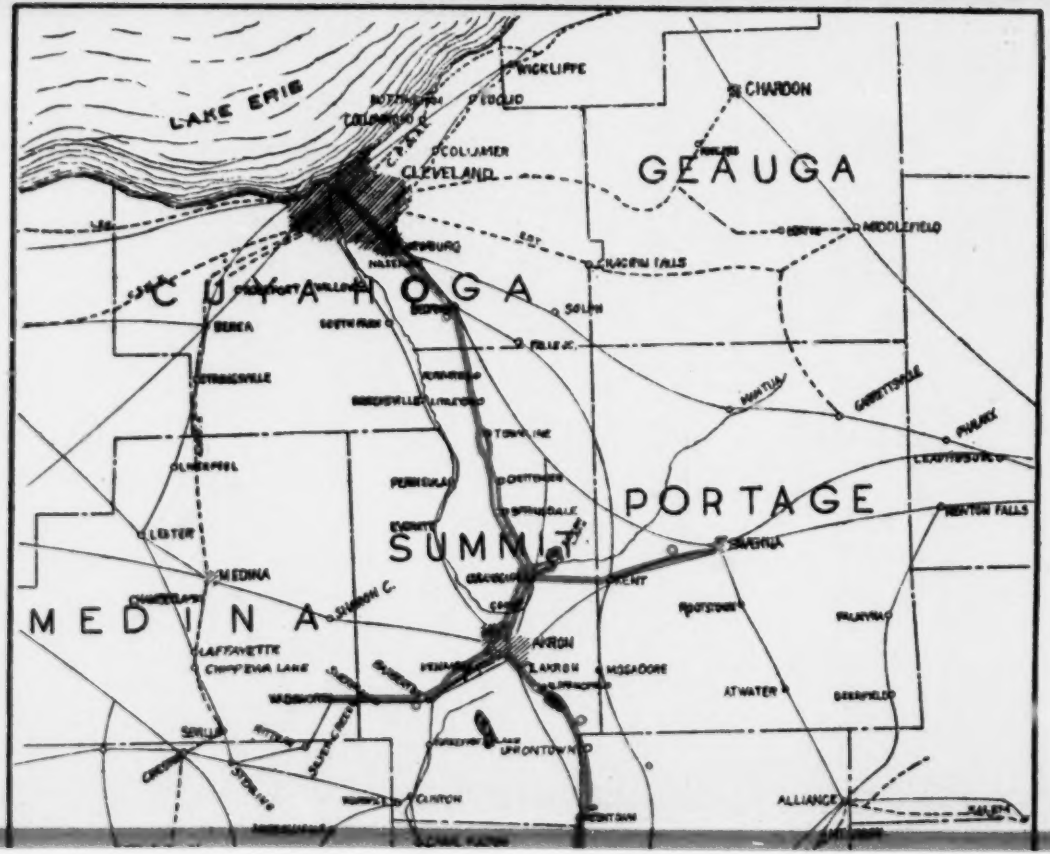
[Vignette.]

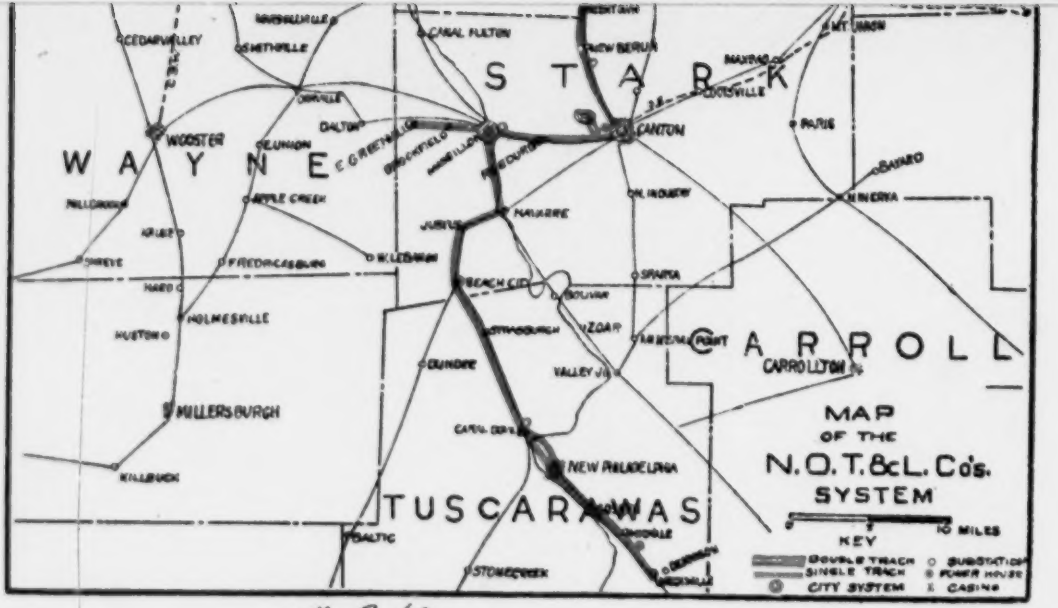
Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

State of Ohio. Summit County, ss: In Common Pleas Court. No. —. Pl't'f's Exhibit 22. C. R. P. Co. vs. N. O. R. Co. A. M. W.

Annual Report for the Year Ended December 31st, 1910.

(Here follows map, marked p. 592.)


LAKE ERIE
CLEVELAND
CHARDON
GEAUGA
MIDDLEFIELD
CUYAHOGA
BEREA
PORTAGE
SUMMIT
MEDINA
AKRON
ATWATER
ALLIANCE



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&
Northern Realty Co

593 The Northern Ohio Traction & Light Company.

Report to the Stockholders for the Year Ended December 31*st,* 1910.

594 Directors.

H. A. Everett, Willoughby, O.; E. W. Moore, Electric Bldg., Cleveland, O.; C. W. Wason, Cleveland, O.; B. Mahler, Electric Bldg., Cleveland, O.; J. R. Nutt, Citizens Savings & Trust Co., Cleveland, O.; F. S. Borton, Guardeau Bldg., Cleveland, O.; Will Christy, Akron, O.; Charles Currie, Akron, O.; W. E. Hutton, Cincinnati, O.; L. E. Beilstein, Toledo, O.; C. J. McCuaig, Montreal, Canada.

Officers.

H. A. Everett, President, Cleveland, O.; Will Christy, 1st Vice President, Akron, O.; Charles Currie, 2nd Vice President and Gen. Mgr., Akron, O.; C. F. Moore, Secretary, Akron, O.; J. R. Nutt, Treasurer, Cleveland, O.; C. H. Lahr, Auditor, Akron, O.

595 The Northern Ohio Traction & Light Company.

President's Office.

CLEVELAND, OHIO, Jan. 21, 1911.

To the Stockholders of The Northern Ohio Traction & Light Company.

Earnings.

The Directors and Officers of your Company herewith submit the following report:

The gross revenue of the Company for the year ended December 31st, 1910, is $2,437,426.08, as compared with $2,177,641.90, showing an increase over the preceding year of $259,784.18, or 11.9%.

The operations of the system as compared with the years 1908 and 1909, are as follows:—

	1908.	1909.	1910.
Gross earnings for year.	$1,890,473.14	$2,177,641.90	$2,437,426.08
Operating and taxes..	1,086,423.64	1,190,057.06	1,348,963.15
Net Earnings ...	$804,049.50	$987,584.84	$1,088,462.92
Applied to payment of interest on bonds and collateral trust notes.	526,532.28	524,065.78	521,069.35
Available for Co.'s uses	$277,517.22	$463,519.06	$567,393.58
Dividends on stock...	134,151.00	157,500.00	225,000.00
Surplus	$143,366.22	$306,019.06	$342,393.58
Average mileage in operation	214	214.88	215.20
Gross earnings per mile	8,167.90	9,405.38	10,376.36
Net earnings per mile.	3,385.95	4,183.02	4,517.87
Ratio of expenses to earnings	57.47	54.65	55.34

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Mileage.

The mileage of the system has been increased 32/100 miles by the construction of additional double track on West Tuscarawas Street, in Canton, Ohio, making at the close of 1910, a total of 215.20 miles of track.

Additions and Improvements.

The total expenditure for additions and improvements for the year was $309,779.74, sub-divided as follows:

Track and roadway.....	$77,192.78
Power houses, car barns, etc.....	73,189.51
Cars and equipment.....	124,081.27
General expenditures	545.47
Light Department	34,770.71

Track.

During the year extensive repairs and renewals have been made on the various Divisions of the Company by way of re-ballasting, placing new ties and the laying of new rails. Twenty-eight Thousand One Hundred Thirty-three (28,133) ties have been renewed. The tracks of the Company are now in first-class condition in every particular.

In the City of Akron, on South Howard Street, from Market to Main Street, and on North Street, from Market to Federal Street, 2,100 feet of track was renewed with 103 lb. Trilby rail, laid on steel ties with concrete foundation and repaved with brick and asphalt.

On Bowery Street, for a distance of 4,000 ft., the old 50 lb. "T" ail and 7 ft. ties have been replaced with 7 in. 73 lb. girder rail id with 6x8x8 ft. ties on stone foundation and paved with brick.
In West Barberton, a new track of 7 in. girder rail was laid for distance of 4,200 ft., replacing a 50 lb. "T" rail.
In the City of Canton, numerous improvements and replacements ave been made on North Cleveland Avenue, West Tuscarawas treet, West Lake Street and McKinley Avenue.
In the City of Massillon, extensive improvements have been made n West Main Street by the substitution of 7 in. 73 lb. girder rail place of 60 lb. "T" rail.

Rolling Stock.

The rolling stock and electrical equipment of the Company have een maintained in good, first-class operating condition. Twenty dditional cars, including equipment, were placed in service during he fiscal year.

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Power Stations.

In the Beech Street power house at Akron, the following additional quipment has been installed:

One—1,000 K. W. Motor Generator Set.
One—600 H. P. B. & W. Boiler.
One—75 K. W. Motor Driven Exciter.
Three—300 K. W. Transformers.

In addition to the above we are now installing:

One—2,500 K. W. Turbo Generator.
One—1,000 K. W. Motor Generator Set.
One—75 K. W. Motor Driven Exciter.

In the Canton power house there was installed:

One—600 H. P. B. & W. Boiler, including the necessary stokers.

Car Barns and Real Estate.

The Canton car barns and shops were equipped with an auto- natic sprinkling system, and for the location of the new proposed ar barns and repair shops the Company has purchased, in the ity of Akron, 8 acres of real estate favorably situated for this pur- ose.

Lighting Department.

In the lighting department, we have continued the policy of lacing all wires in the business section in the City of Akron under- round. The overhead lines have been extended in various parts of he City to take care of the increased growth of business.

Pension Fund.

On April 1st, 1910, your Board of Directors authorized the creation of a Pension Fund from the earnings, on a basis of ¼ of 1%, for the benefit of employes who have grown old in the service or become totally disabled in the performance of their duties, such employes to be retired on 40% of their wages, based upon ten hours per day.

Depreciation.

The policy adopted by your Company in charging from income account a substantial amount for depreciation, has been continued, making a total to the credit of this fund December 31st, 1910, of $400,000.00.

Stockholders.

The Company has 785 stockholders of record, an increase of 75 over the previous year.

The reports of the heads of the various departments of the Company for the year 1910, are very comprehensive and full of valuable information, and are filed in the Company's office for inspection of the stockholders at any time.

Respectfully submitted,

H. A. EVERETT, *President.*

598 The Northern Ohio Traction & Light Company.

Office of 2nd Vice President and General Manager.

AKRON, OHIO, Jan. 21, 1911.

H. A. Everett, Esq., President.

DEAR SIR: I herewith submit statements of the general accounts, and tables showing the results of the operation of The Northern Ohio Traction & Light Company, for the fiscal year ended December 31, 1910, as follows:

Table "A" Condensed Balance Sheet.
" "B" Income Account.
" "C" Earnings and Expenses.
" "D" Earnings and Expenses by months.
" "E" Particulars of Bonded Debt.
" "F" Chart of Earnings, Operating and Surplus.

Very respectfully,

CHARLES CURRIE,
2nd Vice President and Gen. Mgr.

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The Northern Ohio Traction & Light Company.

Condensed Balance Sheet, Years Ended December 31st, 1909 and 1910.

Assets.	1909.	1910.
Cost of road and equipment	$20,451,620.40	$20,927,576.75
Stock in treasury	1,000,000.00	1,000,000.00
Bonds in treasury (not certified)	1,090,000.00	1,088,000.00
Trustee bonds in treasury	3,432,000.00	3,400,000.00
Bonds pledged as security to collateral trust bonds	1,868,000.00	1,900,000.00
Electric Depot Co. stock	20,000.00	20,000.00
Bonds and stocks of other companies	12,650.00	12,030.00
J. R. Nutt, Trustee (coal lands)	40,768.99	.....
Will Christy, Trustee (right-of-way)	77,038.61	.....
A. M. Snyder, Trustee (right-of-way)	35,095.90	35,277.37
Current Assets.		
Cash on hand and in transit	13,515.66	193,072.87
Notes receivable	3,358.10	2,469.12
Due from individuals and companies	60,636.14	71,087.85
Material and supplies	64,013.89	89,327.16
Prepaid and unexpired accounts	10,080.48	9,944.78
Certified bonds in treasury	316,100.00	276,000.00
The Northern Realty Co.	.....	176,388.22
The Northern Ohio Power Co.	.....	1,533.59
Contingent Asset.		
Canton State Bank	2,809.60	1,836.47
	$28,497,687.77	$29,204,544.18

Liabilities.	1909.	1910.
Capital stock	$10,000,000.00	$10,000,000.00
Bonds	17,056,000.00	17,522,000.00
Current Liabilities.		
Accounts payable	70,755.91	87,671.62
Interest accrued but not due	53,694.10	53,520.76
Taxes accrued but not due	28,799.80	35,172.07
Customers' deposits	719.00	968.00
Sundry accounts	12,929.31	9,321.02
Reserve Liabilities.		
Uncollectible Light Dept. accounts	31.16	207.45
Injury and Damage Fund	18,522.02	20,871.07
Insurance Fund	9,070.05	.....
Depreciation	300,000.00	400,000.00
Income account	947,166.42	1,074,812.19
	$28,497,687.77	$29,204,544.18

600 TABLE "B."

The Northern Ohio Traction & Light Company.

Income Account for the Years Ended December 31st, 1909 and 1910.

	1909.	1910.
Gross earnings	$2,177,641.90	$2,437,426.08
Operating expenses and taxes	1,190,057.06	1,348,963.15
Net earnings	987,584.84	1,088,462.93
Int. on bonds and collateral trust notes	524,065.78	521,069.35
Available for Company's uses	463,519.06	567,393.58
Dividends	157,500.00	225,000.00
Bal. surplus for years ended Dec. 31st	306,019.06	342,393.58
Surplus on Dec. 31st, 1908 and 1909.	782,941.76	947,166.42
Total surplus Dec. 31st	1,088,960.82	1,289,560.00
Charged for depreciation, reconstruction, discount on bonds, etc.	141,794.40	214,747.81
Balance surplus, Dec. 31st.	947,166.42	1,074,812.19

601 TABLE "C."

The Northern Ohio Traction & Light Company.

Earnings and Expenses for the Years Ended December 1st, 1908, 1909 and 1910.

Earnings.	1908.	1909.	1910.
Passengers	$1,623,069.73	$1,875,334.18	$2,080,135.77
Light and power	142,543.52	156,614.32	204,434.26
Car mileage	4,106.82	4,244.82	4,420.44
Freight, etc.	44,615.06	58,595.78	67,421.94
Parks	66,656.79	69,746.53	70,309.44
Interest and discount.	2,589.11	5,469.03	5,496.36
Miscellaneous	6,892.11	7,637.24	5,207.87
Total	1,890,473.14	2,177,641.90	2,437,426.08
Expenses.			
Maintenance way and structures	100,159.94	140,179.68	174,326.45
Maintenance equipment	147,602.97	173,221.54	212,237.90
Operation power plants	243,201.56	267,342.19	291,590.34
Conducting transportation	355,319.61	365,718.15	399,230.51
General	240,139.56	243,595.50	271,577.95
Total	1,086,423.64	1,190,057.06	1,348,963.15
Net earnings	804,049.50	987,584.84	1,088,462.93

TABLE "D."

The Northern Ohio Traction & Light Company.

arnings, Expenses and Net Earnings by Months January to December, 1910, Inclusive.

	Earnings.	Expenses.	Net Earnings.
uary	$164,944.30	$94,500.25	$70,444.05
ruary	146,20€.62	92,513.44	53,693.18
ch	173,424.51	99,158.85	74,265.66
il	173,763.22	103,683.08	70,080.14
.....	207,323.25	111,249.65	96,073.60
e	221,673.23	123,124.97	98,548.26
.....	262,020.00	131,937.69	130,082.31
ust	263,149.18	135,832.80	127,316.38
ember	224,901.64	117,857.25	107,044.39
ber	208,341.89	113,370.95	94,970.94
ember	189,705.44	110,718.41	78,987.03
ember	201,972.80	115,015.81	86,956.99
Total	$2,437,426.08	$1,348,963.15	$1,088,462.93

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TABLE "E."

The Northern Ohio Traction & Light Company.

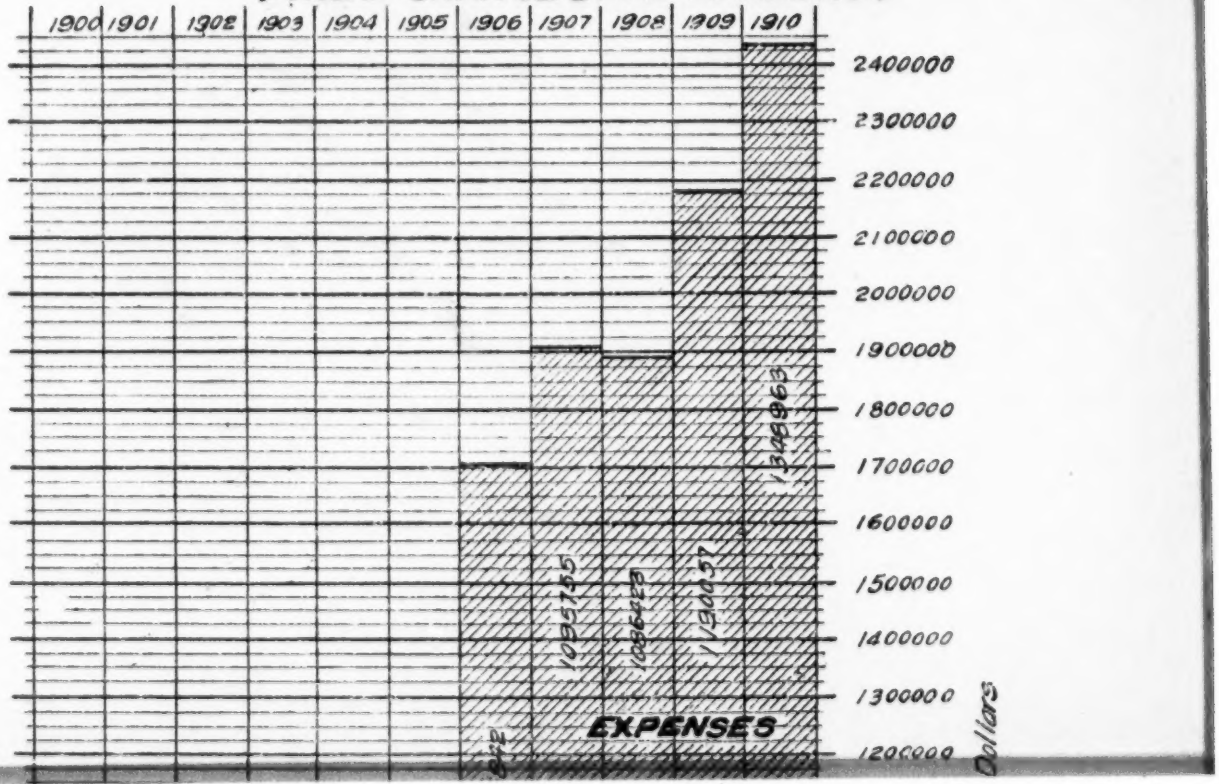
Particulars of Bonded Debt, December 31st, 1910.

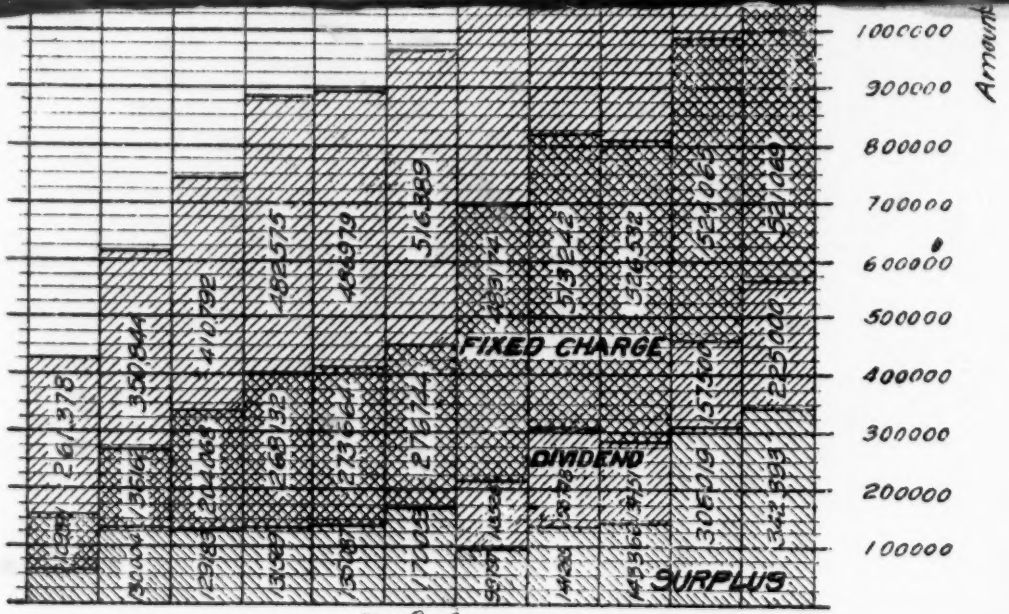
Class of Bonds.	Amount outstanding.	Rate.	Interest when payable.	Amount accrued during year.	Principal due.
Akron, Bedford & Cleveland R. R. Co., 1st Mtge	$300,000.00	5	Mar. and Sept.	$15,000.00	1915
Northern Ohio Traction Co., 1st Cons. Mtge	2,700,000.00	5	Jan. and July	135,000.00	1919
*Northern Ohio Traction & Light Co. Cons. Mtge.	1,000,000.00	5	Jan. and July	50,000.00	1933
*Northern Ohio Traction & Light Co. Cons. Mtge.	2,100,000.00	4	Jan. and July	72,559.65	1933
Canton & Massillon Electric Ry. Co., 1st Mtge	850,000.00	5	May and Nov.	42,500.00	1920
Canton, Akron Railway Co., 1st Mtge	1,150,000.00	5	Mar. and Sept.	57,500.00	1922
Lake View Land & Improvement Co	57,000.00	5	Jan. and July	2,900.00	1910–1916
Canton-New Philadelphia Ry. Co., 1st Mtge	565,000.00	5	Feb. and Aug.	28,250.00	1923
Tuscarawas Railroad Co., 1st Mtge	100,000.00	6	June and Dec.	6,000.00	1916
Tuscarawas Electric Co., 1st Mtge	.....	..	.....	533.32	....
Canton, Akron Cons. Ry. Co., Cons. Mtge	1,036,000.00	5	Jan. and July	51,330.56	1933
†Collateral Trust Serial Bonds	1,000,000.00	6	Feb., May, Aug. and Nov.	59,133.32	1911–1918
	$10,858,000.00			$520,706.85	

* These bonds are secured by the same mortgage and have the same lien on the property.

† The collateral pledged as security for this issue of Collateral Trust Serial Bonds consits of $1,000,000.00 N. O. T. & L. Co. 4's, due 1933; $700,000.00 Canton, Akron Consolidated Railway Co. 5's, due 1933; $200,000.00 Akron, Wadsworth & Western Traction Co., 1st mortgage 5's, due 1933. The said bonds shall mature $100,000.00 thereof on Nov. 1st, in each of the years 1911, 1912, 1913, 1914, and $150,000.00 thereof on Nov. 1st in each of the years 1915, 1916, 1917, 1918.

CHART SHOWING GROSS INCOME, EXPENSES, SURPLUS
FIXED CHARGES AND DIVIDENDS





No 342.
Cuyahoga River Power Co. } p 605
v
Northern Realty Co.

604

Frederic W. Throssell.

Certified Public Accountant.

Citizens Building.

CLEVELAND, OHIO, January 18th, 1911.

The Northern Ohio Traction & Light Co., Akron, Ohio.

GENTLEMEN: In accordance with the request of your President, I have made an examination of the books and accounts of The Northern Ohio Traction & Light Company for the year ended December 31st, 1910, and hereby certify that the balance sheet submitted and showing a surplus at December 31st, 1910, of $1,074,812.19 is correct and agrees with the books of the Company.

Respectfully submitted,

FREDERIC W. THROSSELL,
Certified Public Accountant.

(Here follows diagram marked p. 605.)

606 P'T'FF'S EXHIBIT 19.

State of Ohio, Summit County, ss: In Common Pleas Court. No. —. P't'ff's Exhibit 19. C. R. P. Co. vs. N. O. R. Co. A. M. W.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Established 1893.

The Roberts & Abbott Co., Incorporated, Engineers, Cleveland, Ohio.

Branch Offices: Chicago, Ill.; Baltimore, Md.; Cincinnati, O.
E. P. Roberts, M. E. President. Member Amer. S. O. C., M. E. Member Amer. Inst., E. E.
W. H. Abbott, E. E. Vice President.
Cable Address: eproco.
Western Union Telegraph Code.
Long Distance Telephones.
Mechanical, Electrical, Civil, Industrial and Architectural Engineers.
Plans, Specifications, Supervision, Final Tests, Electric Railway, Electric Lighting, Power Transmission, Heating and Ventilating, etc., etc. Efficiency Tests—Steam and Electrical. Preliminary Reports. Investigations of Operating Plants. Appraisals. Cement Plants. Water Power Development, Fire Prevention & Protection, Industrial & Architectural Engineering.

Subject Water Power Dev. Co.
Please reply under above heading.
Refer to W. H. A.
Address Your Reply to the Company.

CLEVELAND, O., April 29th, 1908.

Mr. W. R. Kimball, The Hollenden Hotel, City.

DEAR SIR: Please note letter which you can submit to people whom you wish to interest, a copy of which we suggest that you send to Mr. Sherman, stating that if he can make one as nearly like it as possible, that it will cover what you desire. You might call his attention to the fact that this amount of power is based on using power ten hours per day instead of 20 hours, viz., for manufacturing purposes, and also on obtaining practically all of the drop, about 235 feet.

We are sending you four copies of this letter.

Yours respectfully,
THE ROBERTS & ABBOTT COMPANY,
Per W. H. ABBOTT.

W. H. A.—O. M.
C. L.
Encl.

This letter to Bacon to get statement from Sherman May 3, '08.*

[* In pencil in copy.]

607 Property of The Cuyahoga River Power Co., Cleveland, O. Document No. Twenty-four (24) with Map No. Twenty-two (22).
Date June 3, 1908.
Reference Meeting of June 3, 1908.
" " April 29th.
Minutes " " April 23, 1909.
" " " April 6, 1912, also Map No. Twenty-two, (22).

Water Power Dev. Co.

W. H. A.

Mr. W. R. Kimball, Hollenden Hotel, City.

DEAR SIR: In reference to the water power project on the Cuyahoga River, please note that the results of our preliminary investigation are as follows:

We have gone over the report of Mr. C. E. Sherman of the National Engineering Company of Columbus, Ohio, the report of Mr. Wells, of the Cleveland Construction Company, Cleveland, Ohio, and the report of Mr. Bacon, the original promoter of the project, and also examined various maps and topographical sheets, and all of the Government reports of the flow of the river issued up to date.

Our engineers have also made an examination of the various sites and have investigated the possibilities of development.

608 From the data thus gathered, we feel assured that over 6,000 K. W. of electrical energy can be developed on this river if all of the falls in the village of Cuyahoga Falls itself, and the various rapids from there on down to a point near Akron, are secured. It is possible to develop all of this in one power house by the building of a pipe line, the power house in such case being located near the city limits of Akron, Ohio.

In order to obtain the above amount of power, it will be necessary to put in large storage reservoirs at some point above Kent, which reservoirs shall be of sufficient capacity to equalize the flow of the river, and enable the water to be used at an average rate all the year around, and to be used during ten hours per day, which will be the average period of demand for manufacturing service.

The various falls in the stream are now owned by a number of different people, and due to the project being distinctly unsuitable for fractional development, the greater part of the fall has not been utilized, and that part on which dams are built is largely running to waste. In order to make a successful project at least three-fourths of the total fall should be secured and a combined power house built.

609 A recent law, passed by the Ohio Legislature, gives the right of Condemnation, and if it is not possible to obtain control of the various powers by negotiation with owners, control can be obtained by applying this law of condemnation.

If this power is developed hydraulically and electrically a ready market for the same should be found in Akron, Barberton, Cuyahoga Falls, and other villages in this vicinity.

The average price at which electrical power is now being disposed of in these places is about six (6c) cents per K. W. hour. The average price which should be received from large manufacturing companies should not be less than two (2c) cents per K. W. hour.

Respectfully submitted,

THE ROBERTS & ABBOTT COMPANY,

Per W. H. ABBOTT.

610 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Preliminary Report on Water Power Development for the Big Cuyahoga Heat, Light and Power Company, Cuyahoga Falls, Ohio.

General Scheme.

The topographical map of Akron, Ohio and its vicinity, attached hereto, shows the proposition in a general way, which may briefly be described as follows.

There are two proposed power house sites which will hereafter be designated as the lower power and the upper power. The lower power is designated on the map as being located on the Big Branch of the Cuyahoga River a short distance west of the corporate limits of the Village of Cuyahoga Falls, Ohio. From the site of the lower power to the point marked "dam" there is a difference in elevation from the level of the water in the river at the power house to the bottom of an old raceway, known as the "Chuckery Race" at the proposed dam site of 166 feet.

The proposed dam is to be 70 feet in height, and is to flood and displace five existing dams located in the Village of Cuyahoga Falls, the upper one of which is located near the business center
611 of the town. At this upper dam the water is backed up in the river to Monroe Falls, where an existing paper mill utilizes approximately ten feet of fall in the river. The paper mill dam at Monroe Falls backs the water up the river to the proposed upper power at Kent, where there is now a twenty foot head of water. From the upper power at Kent the water backs up the river to where it is crossed by the Cleveland and Pittsburg Division of the Pennsylvania Railway.

The general scheme is to conduct such flow of the Cuyahoga River as will be used by the lower power from the proposed seventy feet dam by a canal, which is marked in red on the attached map. The lower and upper powers will be connected by a transmission line.

Discharge.

No extensive set of gaugings of the Cuyahoga River have been made for this section. The best available data are the gaugings made

by the Hydrographic Department of the Geological Survey of the United States Government at Independence, Ohio, for the years 1903 and 1904, covering a drainage area of 698 square miles. The drainage area above the proposed lower power at Cuyahoga Falls is said to be 320 square miles.

The following table gives the relative discharge in Sec. Ft. of the Cuyahoga River at Cuyahoga Falls and Independence.

612 *Relative Discharge of Cuyahoga River.*

	Sec. ft.—Calculated for drainage area of 320 sq. mi. Proportional to quantities in fourth column.	Sec. ft.—Taken from Govt. report of measurements at Independence, Ohio, 10 mi. south of Cleveland. Drainage area, 698 sq. mi.		
		Max.	Min.	Mean.
January	556	3,445	349	1,220
February	1,433	6,170	2,096	3,137
March	1,070	6,380	660	2,342
April	750	6,380	550	1,641
May	438	2,845	414	959
June	500	5,330	255	1,094
July	250	774	317	546
August	132	812	111	288
September	42	157	37	93
October	48	157	37	104
November	50	157	37	109
December	35	142	10	76

613 From the above table it will be noted that for the last five months in the year the discharge per month is considerably lower than during the first part of the year. It is therefore proposed to make up the deficiency in flow for the last five months of the year by constructing a storage reservoir north of the Cleveland and Pittsburg Division of the Pennsylvania Railroad in Streetsboro and Franklin Townships, as shown by the red lines on the attached map. The main reservoir covers approximately 1,760 Acres of land and will have a storage capacity of approximately 1,341,648,000 cubic feet of water. Lake Pippin, at the proposed flow line, as indicated in red, covers approximately 173 Acres, and has a storage capacity of 187,525,800 cubic feet. Above Monroe Falls there is storage capacity in the river of approximately 11,880,000 cubic feet of water, making the total storage for use during the dry season at the lower power of 1,541,053,800 cubic feet, or 119 Sec. Ft. Taking the average flow of the stream for five months in the year at 62 Sec. Ft. gives a total discharge at the lower power of 181 Sec. Ft., which is equivalent to 11,340 theoretical Horse Power.

Assuming the same flow for the upper power as for the lower power, there is available at the upper power 980 theoretical Horse Power.

614 For a considerable portion of the year the flow in the r
is largely in excess of the amount above stated, and the c
from the dam to the lower power has therefore been designe
carry at least 550 cubic feet per second. This amount of flow
each of the powers will give, in addition to the above stated amo
23,160 Horse Power at the lower site, and 2,020 Horse Power at
upper site.

Referring to the topographical map attached hereto, it will
noted that there are a number of lakes in the vicinity of Kent
are tributary to the Cuyahoga River, and there are others not sh
on the map, viz., Congress Lake emptying into Congress Creek, wh
lake lies east of Muzzy Lake, and Chardon and Punderson La
lying north of Streetsboro and Shalersville townships.

The head waters of the Cuyahoga River, having the large pond
area afforded by the lakes above referred to, it has not the exces
floods to which many of our streams are subject. The proposed la
artificial reservoir will also assist in regulating the flow, as well a
conserve the flow during the dry season. Twin Lakes, lying im
diately west of the proposed storage reservoir drain southerly ac
the Pennsylvania Railroad and into the Cuyahoga River, and
will be noted that with a very small amount of work a channel co
be cut from the proposed reservoir into Twin Lakes, th
615 two lakes thereby being flooded to the height of the propo
reservoir and at the same time increasing their storage
pacity practically double the amount of water now contained
them.

Possible Additional Power.

No reference has been made to Monroe Falls in this report
cepting in relation to storage. It might be stated here that the
foot fall at this place would afford approximately 450 theoreti
primary Horse Power, and it has been stated by Mr. Bacon that
power rights at Monroe Falls, now held by the paper mill compa
could be purchased for about Twenty-five Thousand ($25,000.0
Dollars.

616 ## Electrical Installation.

The electrical installation at the lower power is based on installi
three 4,000 kw. generators direct connected to turbines, such nu
ber being considered as desirable for primary power, and for
secondary power three additional generators of the same capaci
At the upper power three generators of 400 kw. capacity for prima
power, and one generator of 1,200 kw. capacity for secondary pow
are included.

Whether or not it will be advisable to install the upper plant
the start will require further consideration, but when it is install
it will not only be of value as an addition to the lower power, b
also it may be found that the most economical operation will res
from operating only the upper power during the time of light loa

that is the latter part of the night, or at such time as the units in such plant are of sufficient capacity for the load.

The estimate includes the connecting of the upper and lower powers by a transmission line.

The electrical installation is estimated on the basis that their market for power will be mainly at the switchboard of the lower power (see paragraph "Market for Power") although there is an allowance of $42,000.00 for transmission line between the two power houses. The estimate does not provide for either step up or step down transformers, but is based on the generators furnishing energy at 10,000 to 13,000 volts, which will be sufficiently high voltage for transmission within such distance of the power house as it now seems probable all the power can be marketed, but if it is necessary to go to greater distances, then step up and step down transformers will have to be furnished, and transmission lines, and possibly right-of-way will have to be obtained for such lines, and such have not been herein estimated. Whether or not step down transformers will have to be furnished will depend upon the contract entered into.

617

Whether the generators will be of the 25 cycle or the 60 cycle type will depend upon the customer. For such portion as may be sold to the Northern Ohio Traction Company the generators will probably be 25 cycle, such Company changing such portion of the energy as they might require for lighting purposes to 60 cycle current. If, however, The Big Cuyahoga Heat, Light and Power Company enter into the field as general distributers, doing a retail business, it will be necessary to furnish 60 cycle current and the necessary apparatus will have to be provided.

Market for Power.

The estimate is based on obtaining a market for all, or practically all, of the primary power at the switchboard at the lower power house. In other words, that The Northern Ohio Traction Company may take the greater portion, if not all, of the primary power and possibly some of the secondary power, although, it is possible that the best arrangement will be to sell a large part of the secondary power to The Northern Ohio Traction Company with little, if any, of the primary, and what will be the best arrangement we are not now prepared to state.

618

Whether it will be best for The Big Cuyahoga Heat, Light and Power Company to do a wholesale business only, furnishing The Northern Ohio Traction Company (which acts as distributer for Akron and considerable distances therefrom) and possibly a few large power consumers, if same can be furnished power by this Company without conflicting with the franchises of The Northern Ohio Traction Company or so interfering with its business that it will not enter into contract with this Company, or whether it will be better to act as retail distributers, obtaining franchises in cities and towns and furnishing to the consumers direct, is a matter which will require careful and detailed investigation. The former has the great

advantage that if satisfactory contract is entered into, the incom
will be undoubtedly assured and presumably the Company will b
free from competition, delays etc. On the other hand, if power i
furnished in a retail manner, the gross income will be largely in
creased, but so also will be the first cost and the operating expenses
and moreover it will be at least a considerable time before the marke
can be developed up to the capacity of the plant. The retail busines
may ultimately be the best, but as before stated, both plans shoul
be carefully worked out and a thorough investigation made of al
the conditions before the policy is decided upon, and as the
619 wholesale plan gives promise of resulting in an excellent prop
osition, it is possible that considerable of the retail basis can
wisely be deferred, at least for the present, but if it is now to be
considered, sufficient time must be given for careful investigation.

In connection with the question of market for the power it should be noted that Kent, Alliance, Canton and Ravenna and Massillon, all manufacturing cities, are within easy transmission distance, and also that the lines of the Cleveland, Southwestern and Columbus Railway and the Eastern Ohio Traction Company, both large consumers of power are within working distance.

The rate assumed under consideration of income is based on one cent (1¢) per Kilowatt hour for primary power and five tenths (.5¢) cent for secondary power. We believe the Company, with ordinarily prudent management, can sell all the output at these rates. We also believe that, with large investment, there is a probability of obtaining rates fully 50% higher on a retail basis.

Operating Expenses.

The operating expenses are based on a wholesale business therefore not requiring any considerable office or field force. A managing superintendent is provided, with one clerk and two shifts at each
of the two power houses so that same can operate continuously.
620 It also includes what we now consider to be a liberal allowance for maintenance and depreciation, especially considering the character of construction on which the estimated first cost is based.

621 *First Cost.*

For the canal leading from the dam to the lower power, we have estimated on an open channel lined with concrete, and that the upper portion of same will be largely rock excavation. In the estimate of cost are included two highway crossings, provision for cross drainage, for an intake at the dam and a penstock leading from the end of the canal to the turbines at the power house.

The estimated cost	$172,500.00
The estimated cost of concrete dam at upper end of the canal is	80,500.00
The estimated cost of improving the upper power is...	20,000.00

The dam at the storage reservoir north of the Pennsylvania Railroad is estimated to follow the embankment of an abandoned portion of said Railroad. Included in the cost is a reinforced concrete dam at the river to afford spillway for flood water.

Total estimated cost for raising and enlarging the old embankment of the Pennsylvania Railroad, and for the spillway above mentioned.....		$118,500.00
Raising bridge and highway across proposed reservoir.		5,000.00
Estimated cost of real estate for storage reservoirs. This is on the basis of 2,500 acres at $60.00 per acre, which is the valuation per acre placed on the land by Mr. Willis Bacon.....	$150,000.00	
1922		
Continued	$150,000.00	
River Properties—as instructed by W. R. Kimball	100,000.00	
Right of way for canal, as guessed by The Roberts & Abbott Co.....	25,000.00	
		$275,000.00
		$671,500.00
Consider as		$675,000.00

1923 *First Cost.*

Mechanical & Electrical Equipment & Bldgs.

	Primary.	Secondary.
Lower Fall—		
Three—4,000 kw. generators.....	$300,000.00	
" additional "	.....	$280,000.00
Upper Fall—		
Three—400 kw. generators; one 1,200 kw. additional, including transmission line between Power Houses.	$55,000.00	$38,000.00
Total	$355,000.00	$318,000.00
Grand total		$673,000.00

Totals.

Dams, Canals & Real Estate	$675,000.
Machinery & Buildings	$673,000.
Transmission Line for some power not delivered to Northern Ohio Traction Company at Lower Power Switchboard	$42,000.
	$1,390,000.
Incidentals & Engineering and Legal 20%—probably large but data insufficient, see Introductory Special Note	$278,000.
Interest during Construction, $1,400,000 for ½ year at 6% annually	$42,000.
Grand Total	$1,710,000.

624

Operating Expense.

(Wholesale Basis.)

Office and Power House Force, Oil and Waste, Telephones and Incidentals	$20,000.0
Insurance—None.	
Taxes—1½ per cent on one-half first cost—exclusive of legal, engineering, etc.—Consider as $1,500,000.00.	11,250.0
Maintenance and Depreciation	62,000.0
	$93,250.0

Income.

(Wholesale Basis.)

Primary Power.

Lower Power:—	
22,000,000 K. W. Hours Annually at 1¢	$220,000.00
Upper Power—	
1,750,000 K. W. " " " "	17,500.00
	$237,500.00

Secondary Power.

Lower Power—	
22,500,000 K. W. Hours Annually at .5¢	$112,500.00
Upper Power—	
2,000,000 K. W. " " " "	10,000.00
	$122,500.00

25 Income—Cont'd.

Gross earnings	$360,000.00
Operating Expenses	93,250.00
Net Income	$266,750.00

E. P. R.

If chemical plants can be induced to locate in the vicinity served, then possibly the income from secondary power can be further increased.

E. P. ROBERTS.

26 Filed Jan. 31, 1910. Supreme Court of Ohio. John S. McNutt, Clerk.

Property of The Cuyahoga River Power Co., Cleveland, O., with Document- No. 26-30, Map No. 22.
Date June 30, 1908.
Reference M't'g June 3, '08.
" Apr. 23, '09.
" " 8, '12.

PL'T'F'S EXHIBIT V.

Description of Parcels of Property.

C. M. Walsh—Parcel No. 1 (Walsh Milling Co.).

Beginning at the intersection of the center of the Cuyahoga River at the north side of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio, thence westerly along the north side of Portage Street to the intersection of the high bank of the west side of the Cuyahoga River and the north side of Portage Street: thence northerly along the said high bank on the westerly side of the Cuyahoga River to a point 30 feet north of the crest of the dam, as now located, of the Walsh Milling Company; thence easterly to the center of the Cuyahoga River to a point approximately 30 feet north of the crest of aforesaid dam: thence southerly along the center of the Cuyahoga River to the place of beginning. Containing approximately 0.5 acres with all the privileges, easements and appurtenances thereunto belonging.

C. M. Walsh—Parcel No. 2.

Beginning at a point in the center of Prospect Street in the Village of Cuyahoga Falls, Summit County, Ohio, on the high bank of the Cuyahoga River on the easterly side thereof; thence westerly along the center of said Prospect Street to the high bank on the westerly side of said River: thence northerly along the high bank of said

river to the north line of said C. M. Walsh's property where sa
joins the property of the Walsh Paper Company: thence easter
following the said north line of C. M. Walsh's property across t
Cuyahoga River to the high bank on the easterly side of same: ther
southerly along the high bank of the easterly side of said Cuyaho
River to the place of beginning. Containing 0.9 acres, more or le
with all the privileges, easements and appurtenances thereunto
longing.

627 The Falls Rivet & Machine Company—Parcel No. 1.

Beginning at the point of intersection of the center of the Cu
hoga River and the north line of Portage Street, in the Village
Cuyahoga Falls, Summit County, Ohio: thence northerly along t
center of said River to a point approximately 30 feet north of t
crest of the Walsh Milling Company's dam, as now located: then
easterly to a point on the high bank of the Cuyahoga River on t
easterly side thereof, said point being approximately 30 feet north
the crest of the aforesaid Walsh Milling Company's dam: then
southerly along the high bank on the easterly side of the Cuyaho
River to the north line of Portage Street: thence westerly along t
north line of Portage Street to the place of beginning. Containi
approximately 0.4 acres more or less, with all the privileges, ea
ments and appurtenances thereunto belonging.

The Falls Rivet & Machine Company—Parcel No. 2.

Beginning at a point on the westerly bank of the Cuyahoga Rive
said point being north 34° 35′ east 380.16 feet, and north 32° ea
89.1 feet from a stone set in the north line of Chestnut Street in t
Village of Cuyahoga Falls, Summit County, Ohio, both of these lin
being along lines of land owned by the heirs of J. Millbank: then
in a line which passes through a recess which is cut into a large ro
near the east edge of the water of the Cuyahoga River to receive t
end of the timber of the "Chickery" dam, and through a point on t
west side of the gorge south of the husk or wheel house, which poi
is about 24 feet south of a mark cut in the perpendicular rock on sa
west side near the bottom by F. D. Paul and G. B. Turner, the ea
end of said line being on the top of the east bank of the river: then
north 31° 45′ east 237.6 feet: thence north 10° east 258.72 fee
thence north 14° east 178.21 feet: thence north 80° 45′ we
628 99 feet along the south line of the Cyrus Prentis tract. Th
west end of this line may also be found by beginning in t
east line of Front Street 1.69 chains north 9° 15′ east of the fir
angle in the east line of said Front Street south of Broad Street, an
which line is also 21 links south of the center line of Prospect Stree
thence along the easterly line of land belonging to Fannie S. Beeb
to the southeasterly corner of her land: thence along the southerl
line of said Fannie S. Beebe's land one rod: thence in a southerl
direction to a point one rod westerly from the place of beginning
thence one rod east to place of beginning. Containing approx

mately 1.5 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Turner, Vaughn & Taylor.

Beginning at the intersection of the westerly high bank of the Cuyahoga River, and the north line of Portage Street in the Village of Cuyahoga Falls, Summit County, Ohio; thence westerly along the north line of Portage Street 49½ feet: thence southerly across said Portage Street to the south line of same; thence easterly along the south line of said Portage Street 49½ feet to the said westerly high bank of the Cuyahoga River; thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, across Broad Street in said Village of Cuyahoga Falls, Summit County, Ohio, to the dividing line between the property of said Turner, Vaughn & Taylor Company and the property of the Walsh Paper Company: thence easterly across the Cuyahoga River to the southeast corner of the property of said Turner, Vaughn & Taylor Company on the easterly high bank of said Cuyahoga River: thence northerly along the high bank of said Cuyahoga River on the easterly side thereof and following the meanderings of same across Broad Street in said Village of Cuyahoga Falls, and across Portage Street also in said Village of
629 Cuyahoga Falls, to the northerly line of said street; thence westerly along the north line of said street to the place of beginning. Containing approximately 6.3 acres more or less, with all the privileges, easements and appurtenances thereunto belonging.

The Walsh Paper Company.

Beginning at the intersection of the westerly high bank of the Cuyahoga River in the Village of Cuyahoga Falls, Summit County, Ohio, and the dividing line between the property of said Walsh Paper Company and the property of Turner, Vaughn & Taylor Company: thence southerly along the high bank of the Cuyahoga River on the westerly side thereof and following the meanderings of same, to the line between the property of the said Walsh Paper Company and the property of C. M. Walsh: thence easterly across the Cuyahoga River to the southeast corner of the property of said Walsh Paper Company, said corner being on the easterly high bank of said River: thence northerly along the high bank of said River on the easterly side thereof and following the meanderings of same to the southeast corner of the property of Turner, Vaughn & Turner Company, said corner being also the dividing line between the property of Turner, Vaughn & Taylor and the said Walsh Paper Company: thence westerly across the Cuyahoga River to the place of beginning. Containing approximately 0.8 acres, more or less, with all the privileges, easements and appurtenances thereunto belonging.

Fannie S. Beebe.

Beginning at the northwest corner of said Fannie S. Beebe's property on the north line of Prospect Street and on the west side of the

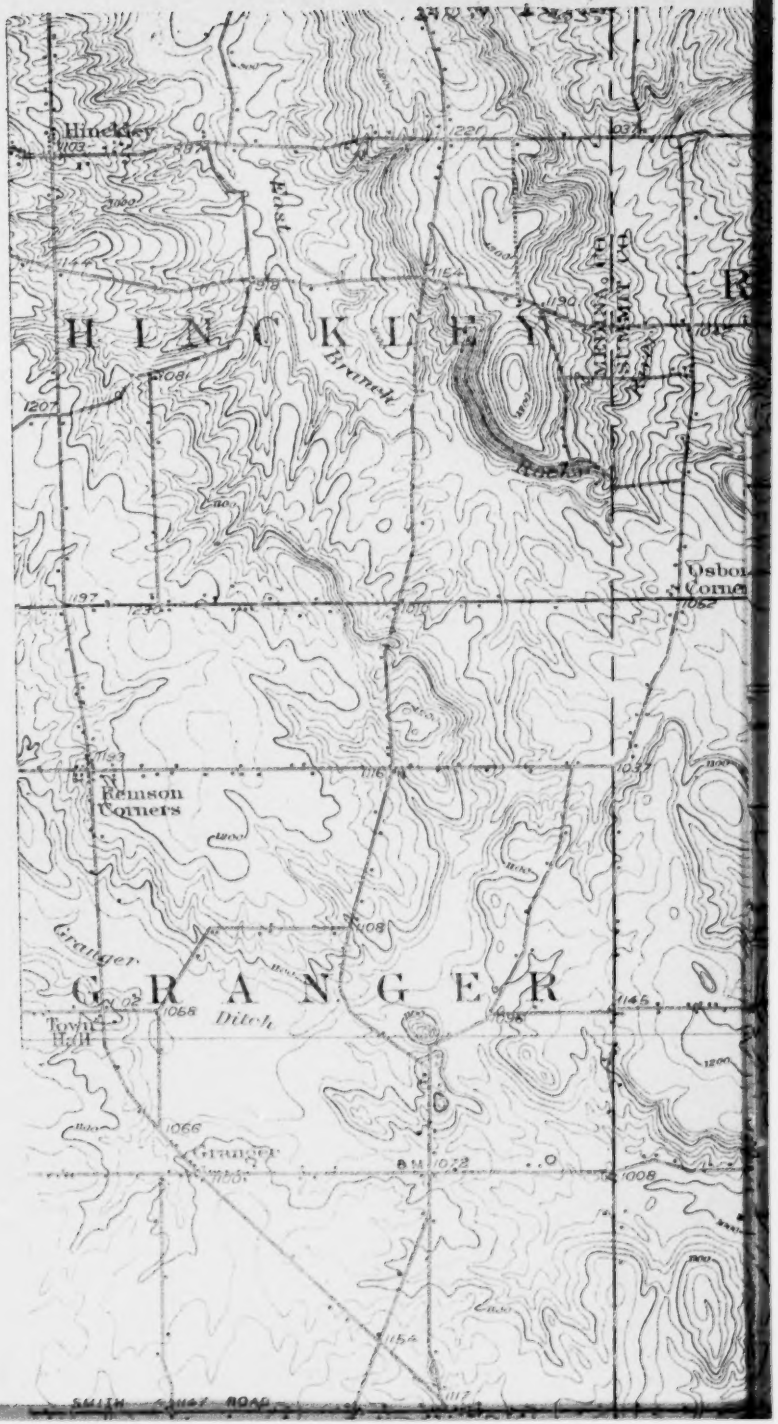
Cuyahoga River, in the Village of Cuyahoga Falls, Summit Coun
Ohio: thence southerly along the west line of said Fannie S. Beeb
property to the southwest corner of same: thence easterly along t
line between the property of said Fannie S. Beebe and the property
The Falls Rivet & Machine Company: thence northerly alo
630 the line between the property of said Fannie S. Beebe and t
property of The Falls Rivet & Machine Company, said li
being the easterly line of the property of said Fannie S. Beebe,
the south line of Prospect Street: thence westerly along the south li
of Prospect Street to the place of beginning, being all of the lot
land belonging to Fannie S. Beebe lying south of Prospect Street a
West of the Cuyahoga River. Containing .67 acres of land more
less, with all the privileges, easements and appurtenances thereun
belonging.

A. B. & C. R. R. Company.

Beginning at an iron pin at the southwest corner of said Railro
Company's land, said pin being on an island in the Cuyaho
River: thence north 1° 20′ east along said Railroad Company's w
line to a point 100 feet distant from the center of the Cuyaho
River, measured at right angles with same: thence southeasterly
the south line of said Railroad Company's property at a point 1
feet distant from the center of the Cuyahoga River, measured
right angles with same: thence along the south line of said Railro
Company's land to the place of beginning. Containing —— acr
more or less, with all the privileges, easements and appurtenan
thereunto belonging.

Henry A. Everett.

Beginning at the point of intersection of the center of the Cu
hoga River and the north and south township line between Porta
Township and Cuyahoga Falls township: thence north 0° 30′ e
100 feet: thence easterly and southeasterly along the northerly ba
of said Cuyahoga River 100 feet distant from the center line of s
River, following the meandering of same, to a point on the li
between the property of said Henry A. Everett and the property
said A. B. & C. R. R. Company, said point being 100 feet direc
from the center of the Cuyahoga River, measured at right ang
with same: thence southerly 1° 20′ west along said line
631 tween the property of Henry A. Everett and the property
the A. B. & C. R. R. Company to the southwest corner
the property of said A. B. & C. R. R. Company: thence southe
88° east of the south line of the property of the A. B. & C. R.
Company, said line being the dividing line between the property
the A. B. & C. R. R. Company and the property of Henry
Everett, to a point 100 feet distant from the center of the Cu
hoga River, measured at right angles with same: thence sou
easterly and northeasterly along the northerly bank of the Cu
hoga River 100 feet distant from the center line thereof, and


HINCKLEY
GRANGER
Hinckley
Brunch
Rock
Remson Corners
Granger
Town Hall
Ditch
SMITH CHASE ROAD

MAPS

TOO

LARGE

FOR

FILMING

lowing the meanderings of same, to a point on a line of the land of said Henry A. Everett, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same: thence northerly along said line to a stone pipe: thence northerly along the high bank of the Cuyahoga River and one rod westerly on same the following courses and distances: 34° 35′ east 264 feet: thence northerly 27° 35′ east 286.44 feet: thence northerly 2° 30′ west 116.16 feet: thence northerly 24° 10′ west 138 feet: thence northerly 8° 40′ east 107.6 feet: thence northerly 19° 31′ east 108.24 feet: thence northerly 36° 40′ east 168.3 feet: thence northerly 53° 40′ east 454.7 feet: thence northerly to the northeast corner of the lot owned by Tom Patterson: thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property of the Falls Rivet & Machine Company: thence along the line between the land of—

(Here follows map marked pp. 632, 633 & 634.)

635 Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Transcript of Docket and Journal Entries to Court of Appeals.

General Code, Secs. 12263 to 65.

Common Pleas Court, Summit County, Ohio.

No. 16979.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY, Defendant in Error.

May 12th, 1911.—Petition in error, and precipe, filed. Summons in error issued to Sheriff Fergusson.

May 13th, 1911.—Transcript from Probate Court, filed.

May 19th, 1911.—Summons in error returned endorsed "Received this writ May 13th, 1911, at 4 o'clock P. M., and pursuant to its command on May 18th, 1911, I personally delivered a true and certified copy of this writ to Will Christy, president of The Northern Realty Company. David R. Fergusson, Sheriff. By F. M. Jewell, Deputy.

September 18th, A. D. 1911.—April Term. It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

September 27th, A. D.—September Term. Be it remembered that on the 27th day of September A. D. 1911, being a day in the September Term A. D. 1911 of this court, the said parties appeared by their attorneys, and this cause came on to be heard upon the petition in orror of the said The Cuyahoga River Power Company, plaintiff in error, herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Probate Court of Summit County, Ohio, filed therewith in the said Court of Common Pleas wherein plaintiff in error was plaintiff and defendant in error was defendant, mentioned and referred to in said petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by the court that the judgment and proceedings of the said Probate Court in said cause in favor of said defendant in error and against said plaintiff in error be, and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $— and in default thereof that execution issue therefor.

To all of which orders, judgment and decrees plaintiff in error excepted and here and now excepts. J1,60-194.

(Taken to Circuit Court Sept. 28, 1911, under #992).

March 16th, 1914. Depositions for Pl'ff, filed.

March 16th, 1914. Motion, filed.

March 17th, 1914. January Term. On motion of defendants, it is ordered that plaintiff give security for costs herein to ac-
636 crue. A deposit with the Clerk of One Hundred Dollars in money shall be deemed to be a sufficient compliance with this order for the time being. J1.64-680.

March 18th, 1914. Bond, filed.

March 18th, A. D. 1914. January Term. On motion of The Northern Ohio Traction & Light Company, which claims an interest in this proceeding, it has leave to become a defendant herein and file an answer by the 10th day of March, and upon motion of The Northern Realty Company, said The Northern Realty Company has leave to file an answer herein by March 10th. J1.64-686.

April 13th, A. D. 1914. January Term. It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

May 1st, A. D. 1914. April Term. This cause came on to be heard upon the pleadings, evidence and exhibits and was argued by counsel and submitted to the court. Whereupon the court finds the issues in favor of the defendants and against the plaintiff. It is therefore ordered and adjudged that the petition of plaintiff herein be dismissed, and judgment is rendered against plaintiff for the costs herein taxed at $—. To which judgment and order of the court the plaintiff here and now duly excepts. J1.65-134.

May 11th, 1914. Bill of Exceptions, filed.

May 11th, 1914. Notice of filing Bill of Exceptions mailed to Rowley, Mather & Eagleson. Bert C. Garman, Clerk.

May 20th, 1914. Bill of Exceptions transmitted to Trial Judge W. J. Ahern, Jr. Bert C. Garman, Clerk.

May 21, 1914. Bill of Exceptions again received from Trial Judge W. J. Ahern, Jr., corrected and allowed. Bert C. Garman, Clerk.

637 & 638 THE STATE OF OHIO,
Summit County:

I the undersigned, Clerk of the Common Pleas Court, in and for said County, do hereby certify that the foregoing is a true transcript of the Docket and Journal Entries of said Court in the above entitled cause, and that the said — entered into a written undertaking with approved suret-, conditioned to abide and perform the order and judgment of the Court of Appeals, and to pay all moneys, costs and damages which may be required of or awarded against said — by said Court of Appeals; and I further certify that the papers herewith sent, numbered from one up to —, are all the original papers and pleadings filed in the above cause of The Cuyahoga

River Power Company Plaintiff in Error, against The Northern Realty Company Defendant in Error.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Common Pleas Court on this 15th day of May A. D. 1914.

[Seal Common Pleas Court of the County of Summit, Ohio.]

BERT C. GARMAN. *Clerk,*
By M. CRUMB, *Deputy.*

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[Endorsed:] No. 80. Dec. —. Page —. Common Pleas Court, Summit County, O. The Cuyhoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company, Defendant in Error. Willis Bacon, Tiffin, Ohio, and D. C. Westenheaver, Cleveland, O., Plaintiff's Attorneys. Rowley, Mather & Eagleson, Defendant's Attorneys. Transcript of Docket and Journal Entries. Filed Court of Appeals May 15, 1914. Summit County, Ohio. Bert C. Garman, Clerk.

639 In the Court of Appeals.

Filed Feb. 4, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

STATE OF OHIO,
Summit County, ss:

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Petition in Error.

Plaintiff in error says that at the April Term, 1914, of the Court of Common Pleas of Summit County, defendants in error recovered a judgment by the consideration of said Court, against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff, and defendants in error were defendants, a transcript of the docket and journal entries whereof are filed herein.

There is error in the said record and proceedings in this, to wit:

First. Said Court erred in sustaining the motion of defendants in error to dismiss said case.

Second. Said Court erred in the admission of the evidence of said The Northern Realty Company and said The Northern Ohio Trac-

ion & Light Company, to which the said The Cuyahoga River Power Company objected.

Third. Said Court erred in ruling out the evidence offered by said The Cuyahoga River Power Company, to which the said The Cuyahoga River Power Company excepted.

Fourth. Said ruling of said Court was contrary to Law, and contrary to the evidence introduced.

Fifth. The ruling of said Court was against the weight of the evidence introduced in said case.

640 Sixth. Said Court erred in holding that the description of the property which plaintiff in error sought to condemn, was insufficient.

Seventh. Said Court erred in granting the motion of defendants in error in that said decision is in violation of the rights secured to the plaintiff in error by Article I, Section 10, of the Constitution of the United States, which provides that no State shall pass any Law impairing the obligation of contracts.

Eighth. Said Court erred in that its decision violates the rights guaranteed to the plaintiff in error by the Fourteenth Amendment of the Constitution of the United States, Section 1, which provides that no State shall deprive any person of life, liberty or property without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws.

Ninth. Said Court erred in that its decision violates the rights of plaintiff in error, guaranteed to it by the Constitution of the State of Ohio, Article II, Section 28, which provides that the General Assembly shall have no power to pass Laws impairing the obligation of contracts.

Tenth. Said Court erred in that its decision violates the rights of plaintiff in error, guaranteed to it by Article I, Section 19 of the Constitution of the State of Ohio, which says that private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Eleventh. Said Court erred in holding that proper offers for said property were not made.

641 Twelfth. Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.

Thirteenth. Said Court erred in holding that the property of said defendants in error had been dedicated to public use.

Fourteenth. Said Court erred in giving a judgment for said defendants in error, when it ought to have been given for said plaintiff in error.

Plaintiff in error therefore prays that said judgment may be re-

versed, and that it may be restored to all things it has lost by reason thereof.

WILLIAM Z. DAVIS,
JOHN FRANK,
ENGLANDER & BOWDEN,
WILLIS BACON,
COLLIN, WELLS & HUGHES,
Attorneys for Plaintiff in Error.

642 STATE OF OHIO,
Summit County, ss:

In the Court of Appeals.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Precipe.

To the Clerk of said Court:—

Please issue summons in error to the Sheriff of said County, directed to Rowley, Mather and Eagleson, and Roy Nesbit, Attorneys for defendants in error.

WILLIAM Z. DAVIS,
JOHN FRANK,
ENGLANDER & BOWDEN,
WILLIS BACON,
COLLIN, WELLS & HUGHES,
Attorneys for Plaintiff in Error.

643 [Endorsed:] 16979. #80. State of Ohio, Summit County, ss: In the Court of Appeals. The Cuyahoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company et al., Defendants in Error. Petition in Error. Filed Court of Appeals, Summit County, Ohio, May 15, 1914. Bert C. Garman, Clerk. Englander & Bowden, Attorneys-at-Law. Leader-News Bldg. Cleveland. Filed Supreme Court of Ohio, Feb. 4- 1915. Frank McKean, Clerk.

644 *Mandate from the Court of Appeals.*

General Code, Sec. 12240.

THE STATE OF OHIO,
Summit County, Court of Appeals:

At a term of the Court of Appeals, within and for the County of Summit in the State of Ohio, begun and held before Hon. [illegible] H. Winch, Hon. W. D. Meals, Hon. C. R. Grant, Presiding Judges, at Akron, Ohio, on the 16th day of Sept. A. D. 1914, among other proceedings then and there had by and before said Court, as appears by its Journal, were the following, viz:

No. 80.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY et al.

This cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings, and the transcript of the record in the Court of Common Pleas, and was argued by counsel and submitted to the court; on consideration whereof the judgment of said Court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error.

It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein.

Ordered that a special mandate be sent to the Common Pleas Court to carry this judgment into execution.

To which judgment and order of the court and to each and every part thereof, plaintiff in error here and now duly excepts.

Ordered that a special Mandate be sent to the Court of Common Pleas of said County to carry this judgment into execution.

Ordered that a copy of this entry be certified to the Clerk of the Court of Common Pleas of said County for entry, etc.

I, Bert C. Garman, Clerk of the Court of Appeals of Ohio, within and for Summit County, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court, this 29 day of Jan. 1915.

[Seal Court of Appeals, Summit County, Ohio.]

BERT C. GARMAN,
Clerk of Court of Appeals,
By M. CRUMB, *Deputy.*

645 [Endorsed:] J. C. 1-150. No. 80, Ct. of App'l. No. — C. P. Ct. Court of Appeals, Summit County, O. The Cuyahoga River Power Co., vs. The Northern Realty Co. et al. Mandate. Filed Jan. 27, 1915. Court of Appeals, Summit County, Ohio, —— ——, Clerk.

646 Copy.

Filed Jan. 9, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,
v.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants.

Motion to Direct the Court of Appeals of Summit County to Certify — in this Case to the Supreme Court.

The plaintiff, The Cuyhoga River Power Company, a corporation existing under and by virtue of the laws of Ohio, moves this court for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio for review for the reasons following, to wit:

First. All of the questions involved in this case relate to the proper application of the law of eminent domain where there are conflicting claims of different corporations; and the same have not been provided for by statute, nor specifically settled by decision of the courts of Ohio. Therefore they are of public interest and of great general interest in that the answer thereto would define corporate rights which have been conferred by general statutes enacted by the General Assembly of Ohio.

Second. Some of the questions submitted in the record of this case are as follows:

1. Do the rights and privileges conferred upon a corporation by the state of Ohio constitute a contract, the obligation of which cannot be impaired?

2. What estate and priority, if any, does a corporation acquire which first makes a preliminary survey, adopts a plan or
647 route and formally locates the same by resolution of its board of directors?

3. Can a public utilities corporation owning land as private property, devote the same to a use public in its nature, but for which use such corporation would have no authority to appropriate or condemn the same, so as to defeat appropriation proceedings by another corporation expressly authorized by statute to exercise the power of eminent domain?

4. If so, can a public service corporation so devote its private property to such use as to defeat appropriation proceedings by another corporation expressly authorized by statute to exercise the power of eminent domain, when such appropriation proceedings were begun before the actual attempt to devote the land to the

ner use, or when the appropriating corporation had already acquired a right by a formal location over and upon the land?

5. What is a "devotion" to a public use; and can there be such a devotion of private property, other than by condemnation, or possibly by a formal dedication to the public in writing so that the user cannot be withdrawn and the property revert to private ownership?

6. To put a question in concrete form, the facts appearing in this record: Can an interurban electric railway, the defendant company, The Northern Ohio Traction & Light Company, which purchases land and holds and treats the same as private property for a long series of years, be permitted, after proceedings begun to appropriate the land for hydro-electric purposes by the plaintiff, The Cuyahoga River Power Company, of which The Northern Ohio Traction & Light Company had full notice, to build a power
648 house on said land and thereby to defeat the appropriation by the plaintiff, The Cuyahoga River Power Company?

7. The Court of Common Pleas and the Court of Appeals held that The Northern Ohio Traction & Light Company might lawfully do as stated in question 6 above, and that therefore The Cuyahoga River Power Company has no right to appropriate the land. And therefore, again, is not this result an impairment of the obligation of the contract between the state and this plaintiff; and again, is not this result attained without due process of law?

8. Hence we claim that this case involves questions under the Constitution of the United States and the Constitution of Ohio.

9. Besides error in the judgment, numerous errors in the admission of evidence appear in the Bill of Exceptions.

The plaintiff therefore moves the court for an order requiring the Court of Appeals of Summit County to certify its record in said case to this court for review.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff.

649 Copy.

Filed Jan. 12, 1915, Supreme Court of Ohio. Frank E. McKean Clerk.

Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff,

v.

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants.

Notice of Motion.

The plaintiff hereby gives notice to the defendants that on Thursday January 21, 1915, at 9:00 o'clock A. M., or as soon thereafter as counsel can be heard, the plaintiff will apply to the Supreme Court of Ohio at their rooms in Columbus, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case, for review by the said Supreme Court of Ohio.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff.

Service of the above by copy acknowledged, and also copy of Motion received this 11th day of January, 1915.

ROGERS, MATHER & NESBITT,
Att'ys for Defendants.

650 & 651 THE STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing is a true and correct copy of the Motion to direct the Court of Appeals of Summit County to certify its record to the Supreme Court of Ohio, and notice thereof, in case No. 14803, The Cuyahoga River Power Company, Plaintiff in Error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company, defendants in error, said motion being filed in said Court on the 9th day of January A. D. 1915, and said notice being filed in said Court on the 12th day of January, 1915, said motion and notice being now lodged in my office.

In Witness Whereof, I have hereunto subscribed my name and

affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[The Seal of the Supreme Court of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 1/3/16. McKean.

652 In the Supreme Court of Ohio.

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
v.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Petition in Error.

Filed Feb. 4, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

Plaintiff in error says that on the 27th day of January, 1915, in the Court of Appeals in and for Summit County, Ohio, defendants in error recovered a judgment by the consideration of said court, against plaintiff in error in an action then pending therein, wherein plaintiff in error was plaintiff, and defendants in error were defendants. A transcript of the docket and journal entries whereof, the Bill of Exceptions, and such other original papers as are necessary to show the errors complained of, are filed herein.

There is error in the said record and proceedings, in this, to-wit:

First. Said court erred in that said judgment is in violation of the rights secured to the plaintiff in error by Article I, section 10, of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.

Second. Said court erred in that its said judgment violates the rights guaranteed to the plaintiff in error by the Fifth Amend-
653 ment to the Constitution of the United States, and also the Fourteenth Amendment to the Constitution of the United States, Section I, which provides that no State shall deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and also violates Article I, section 16, of the Constitution of Ohio.

Third. Said court erred in that its said judgment violates the rights of plaintiff in error, guaranteed to it by the Constitution of the State of Ohio, Article II, section 28, which provides that the

General Assembly shall have no power to pass laws impairing the obligation of contracts.

Fourth. Said court erred in that its said judgment violates the rights of plaintiff in error, guaranteed to it by Article I, section 19, of the Constitution of the State of Ohio, which says that private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Fifth. Said court erred in holding that the property of said defendants in error had been dedicated to public use.

Sixth. Said court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.

654 Seventh. Said court erred in rendering a judgment for said defendants in error when it ought to have been given for said plaintiff in error.

Eighth. Said court erred in the admission of the evidence of said The Northern Realty Company and said The Northern Ohio Traction and Light Company, to which the said The Cuyahoga River Power Company objected.

Ninth. Said court erred in ruling out evidence offered by the said The Cuyahoga River Power Company, to which ruling the said The Cuyahoga River Power Company excepted.

Tenth. Said ruling of said court was contrary to law, and contrary to the evidence introduced.

Eleventh. The ruling of said court was against the weight of the evidence introduced in said case.

Twelfth. Said court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient.

Plaintiff in error therefore prays that said judgment may be reversed, and that it may be restored to all things it has lost by reason thereof.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
FRANK & REAM,
WILLIS BACON,
Attorneys for Plaintiff in Error.

We hereby waive the issue and service of summons in error in the above entitled case, and enter the appearance of defendants hereto this 3rd day of February, 1915.

ROGERS, MATHER & NESBITT,
Att'ys for Def't in Error.

55 & 656 STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing is a true and correct copy of the Petition in Error in case No. 14803 The Cuyahoga River Power Company, plaintiff in error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company, Defendants in Error, filed in said Court on the 4th day of February A. D. 1915, and now lodged in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/3/16. McKean.]

57 In the Supreme Court of Ohio.

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Motion to Dismiss Petition in Error.

Filed Feb. 24, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Now come Defendants in Error and move the Court to dismiss the petition in error of Plaintiff in Error herein for the following reasons, to-wit:

I.

The judgment of the Court of Appeals in this case was final.

II.

This is not a case involving a question under the Constitution of the United States or of this State.

III.

That it is not a case of public or great general interest in which this Court may direct the Court of Appeals to certify its record to this Court.

IV.

That this Court has not jurisdiction of the action.

ROGERS, MATHER & NESBITT,
Attorneys for Defendants in Error.

658 In the Supreme Court of Ohio.

#14803.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff in Error,
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants in Error.

Notice of Motion.

Filed Feb. 24, 1915. Supreme Court of Ohio. Frank E. McKean Clerk.

Defendants in Error hereby give notice to Plaintiff in Error tha they have filed their motion in the above entitled cause, asking th Court to dismiss the petition in error of Plaintiff in Error, and tha said motion will be heard in said Court on Thursday, the 11th day o March, A. D. 1915, at nine o'clock A. M., or as soon thereafter a the attention of the Court can be obtained.

A copy of said motion is hereto attached.

ROGERS, MATHER & NESBITT,
Attorneys for Defendants in Error.

Service of the above notice by copy acknowledged, and also cop of motion received this 24th day of February, A. D. 1915.

W. Z. DAVIS,
COLLIN, WELLS & HUGHES,
WILLIS BACON,
Attorneys for Plaintiff in Error.

659 THE STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State o Ohio do hereby certify that the foregoing is a true and correct cop of the Motion to dismiss petition in error and notice of motion t dismiss petition in error in case No. 14803, The Cuyahoga Rive Power Company, Plaintiff in Error, vs. The Northern Realty Com pany and The Northern Ohio Traction & Light Company, defend ants in error, filed in said Court on the 24th day of February A. D 1915, and now lodged in my office.

In witness whereof, I have hereunto subscribed my name an

affixed the Seal of said Supreme Court of Ohio, this 3rd day of January, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

United States internal revenue documentary stamp, series of 1914, ten cents, cancelled 1-3-16. McKean.

660 ——

661 Supreme Court of the State of Ohio, of the Term of January, A. D., 1915.

Towit: Tuesday, March 23rd.

STATE OF OHIO,
City of Columbus:

No. 14803.

THE CUYAHOGA RIVER POWER COMPANY
vs.
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY.

Error to the Court of Appeals, Summit County.

This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right, according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said Court of Appeals to certify its record in said cause to this court for review, and said motions were argued by counsel and submitted to the court and the court having considered the same does find that this Court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio.

It is, therefore, ordered and adjudged that said motion to dismiss said petition in error be, and it is hereby, sustained, and said petition

in error is dismissed; and that the said motion to direct the Court of Appeals to certify its record to this Court be, and it is hereby, overruled.

It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $—.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said Court, to-wit: from Journal No. 27 Page 65.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 30th day of March, A. D. 1915.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN, *Clerk.*
By SEBA H. MILLER, *Deputy.*

Cost bill on other side.

Supreme Court Cost Bill.

Petition in error $5.00, paid by Wm. Z. Davis.
Motion, $2.00, paid by Wm. Z. Davis.
Motion, $2.00, paid by Rogers, Mather & Nesbitt.

[Endorsed:] C. of Appeals. #80. Jl. 1-158. Supreme Court of the State fo Ohio. No. 14803. The Cuyahoga River Power Co. vs. The Northern Realty Co. et al. Certified copy of entry. Filed, Court of Appeals, Apr. 10, 1915. Summit County, Ohio. —— ——, Clerk. Rec'd 4/10/15.

662 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error

Know All Men by These Presents, That the undersigned National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City of New York, County and State of New York, is held and firmly bound unto The Northern Realty Company and The Northern Ohio Traction & Light Company in the just and full sum of Five Hundred ($500.00) Dollars, to be paid to said The Northern Realty Company and The Northern Ohio Traction & Light Company, their successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 10th day of September, 1915.

Whereas, the above named The Cuyahoga River Power Company

has prosecuted a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Ohio in and for the Eighth District to reverse the order and judgment of said Court of Appeals in the above entitled cause.

Now, Therefore, the condition of this obligation is such, that if the above named The Cuyahoga River Power Company shall prosecute its said writ to effect and answer all costs if it fail to make good its plea then this obligation shall be void, otherwise to remain in full force and effect.

[Seal National Surety Company, New York. Incorporated, 1897.]

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

N. V. TYNAN,
Resident Ass't Secretary.

663 STATE OF NEW YORK,
County of New York, ss:

On this 10th day of September, 1915, before me personally appeared Wm. A. Thompson, Resident Vice-President of the National Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the County of New York; that he is the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within instrument; that he knows the corporate seal of said Company; that the seal affixed to the within instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company, and that he signed said instrument as Resident Vice-President of said Company by like authority, and that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent, pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York. And said Wm. A. Thompson further said that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant Secretary of said Company; that the signature of the said N. V. Tynan subscribed to the said instrument is in the genuine handwriting of the said N. V. Tynan and was thereto subscribed by the like order of the said Board of Directors and in the presence of him, the said Resident Vice-President.

[Seal H. E. Emmett, Notary Public, Kings County.]

H. E. EMMETT,
Notary Public for Kings County No. 3.

Certificate filed in New York County, No. 2, Nassau, Bronx, Queens Richmond and Westchester Counties, Kings County Register's Office No. 6002, New York County Register's Office No. 6003. Bronx County Register's Office No. 6004.

Copy of By-Law.

Be it remembered: That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the sixth day of February, 1912, a quorum being present, the following By-Law was adopted:

Article XIII.

Section 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority, in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or to use the scroll of the Attorney-in-Fact, or a wafer, wax, or other similar adhesive substance affixed thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "SEAL" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

STATE OF NEW YORK,
County of New York, ss:

I, N. V. Tynan, resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company in the County of New York, this 10th day of September, 1915.

[Seal National Surety Company, New York, Incorporated, 1897.]

N. V. TYNAN,
Resident Assistant Secretary.

664 [Endorsed:] — 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company,

aintiff-in-error, against The Northern Realty Company, and The orthern Ohio Traction and Light Company, defendant-in-error. ond. Filed Court of Appeals Sep. 20, 1915, Summit County, Ohio, C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plain- f in Error, Office & P. O. Address, 120 Broadway, Borough of Man- attan, New York City. Approved: Mahlon Pitney, Associate Jus- ce Supreme Court of the United States.

35 UNITED STATES OF AMERICA, *ss:*

o The Northern Realty Company and The Northern Ohio Traction and Light Company, Ohio corporations, Greeting:

You are hereby cited and admonished to be and appear at a Su- reme Court of the United States, to be held at Washington on the th day of October, 1915, pursuant to a writ of error filed in the ffice of the Clerk of the Court of Appeals of the State of Ohio, ighth District, wherein The Cuyahoga River Power Company is laintiff-in-error and you are defendants-in-error, to show cause, if ny there be, why the judgment herein against the said plaintiff-in- rror, as in the writ of error mentioned, should not be corrected, and hy speedy justice should not be done to the parties in that behalf. Witness the Hon. Mahlon Pitney, Associate Justice of the Supreme ourt of the United States, this 9th day of September, 1915.

MAHLON PITNEY,
Justice of the Supreme Court of the United States.

Service of the foregoing citation is hereby admitted this 20th day f September, 1915.

ROGERS, MATHER & NESBIT,
Attorney- for Defendants in Error.

366 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Citation. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error. Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City. Filed Court of Appeals, Summit County, Ohio, Sep 20 1915. B. C. Garman, Clerk.

667 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Petition for a Writ of Error from the Supreme Court of the United States to the Court of Appeals of Ohio, Eighth District.

To the Honorable, the Judges of the Court of Appeals of Ohio, Eighth District:

Now comes The Cuyahoga River Power Company, plaintiff-in-error in the above entitled cause, and complains and alleges: Heretofore and on or about the 20th day of January, 1911, a petition was filed by this petitioner against the defendant-in-error, The Northern Realty Company, in the Probate Court of Summit County, Ohio, for the purpose of appropriating for a public use, in accordance with the statutes of Ohio in such cases made and provided, certain property which was deemed by said petitioner to be and was in fact necessary for the construction of a plant for the develop-
668 ment of hydro-electric power upon the Cuyahoga River in the State of Ohio, under and pursuant to a charter duly granted by the State of Ohio to said petitioner, by which charter said petitioner was authorized and empowered to construct the plant aforesaid and to acquire by an exercise of the power of eminent domain the property which it deemed necessary for that purpose.

Said petition duly proceeded to a trial or hearing, as provided by the statutes of Ohio, and such proceedings were had that the defendant-in-error, The Northern Ohio Traction and Light Company, appeared therein, and on or about the 27th day of January, 1915, the Court of Appeals of the State of Ohio, in and for the Eighth District, made and entered a final order and judgment against said petitioner, The Cuyahoga River Power Company, denying said petitioner's application for the appropriation of said property for the purposes aforesaid; and said Court of Appeals thereby made a decision against a right, title and privilege, specially set up and claimed by said petitioner in said proceeding, under the Constitution of the United States; and in said final order and judgment, and in the proceedings had prior thereto in said proceeding, certain errors were committed to the prejudice of the plaintiff-in-error herein, all of which will more in detail appear from the assignment of errors which is filed with this petition.

After the rendition of the order and judgment aforesaid, said petitioner, The Cuyahoga River Power Company, applied to
669 the Supreme Court of the State of Ohio for a writ of error to review said order and judgment of said Court of Appeals, but said Supreme Court of Ohio refused to grant said writ of error and refused to take jurisdiction of or hear or review said cause or

id judgment or order; and said judgment or order of said Court Appeals was and is a final order and judgment in the highest urt of the State of Ohio in which a decision could or can be had. Wherefore your petitioner, The Cuyahoga River Power Company, ays for the allowance of a writ of error from the Supreme Court the United States to said Court of Appeals of the State of Ohio id the judges thereof, to the end that the record in said cause may e removed into the Supreme Court of the United States and the ror complained of by your petitioner may be examined and cor-ected and said judgment or order reversed, and your petitioner re-ored to all things that it has lost by reason thereof; that the bond erewith presented be approved; and that a transcript of the record, roceedings and papers in said cause, duly authenticated, may be nt to the Supreme Court of the United States.

THE CUYAHOGA RIVER POWER COMPANY,
Petitioner.

By COLLIN, WELLS AND HUGHES,
Attorney-.

70 A writ of error as prayed for in the foregoing petition is hereby allowed this 9th day of September, 1915, and the ond for that purpose is fixed at $500.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

71 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Petition for Writ of Error. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error. Office and P. O. Address, 120 Broadway, Bor-ough of Manhattan, New York City. Filed Court of Appeals, Sum-mit County Ohio, Sep 20 1915. B. C. Garman, Clerk.

672 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Writ of Error from the Supreme Court of the United States to the Court of Appeals of the State of Ohio, Eighth District.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Court of Appeals of the State of Ohio in and for the Eighth District of said State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Court of Appeals of the State of Ohio, in and for the Eighth District of said State, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit
673 between The Cuyahoga River Power Company and The Northern Realty Company and The Northern Ohio Traction and Light Company, wherein was drawn in question the validity of a statute of, or an authority exercised under, the United States of America and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Ohio, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute, or commission held under, the United States, and the decision was against the right, title, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; manifest error hath happened to the great damage of the said The Cuyahoga River Power Company, as by its complaint appears; and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same
674 at Washington on the 8th day of October, 1915, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 9th day of September, 1915.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed September 9th, 1915.
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

675 [Endorsed:] —. 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and the Northern Ohio Traction & Light Company, Defendants-in-Error. Filed Court of Appeals Sep. 20, 1915. Writ of Error. Summit County, Ohio. B. C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York City.

676 Court of Appeals of the State of Ohio, Eighth District.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error,
against
THE NORTHERN REALTY COMPANY, and THE NORTHERN OHIO TRACTION & LIGHT COMPANY, Defendants-in-Error.

Assignment of Errors.

Now comes The Cuyahoga River Power Company, plaintiff-in-error, and respectfully submits that in the record, proceedings, and final order or judgment of the Court of Appeals of the State of Ohio in and for the Eighth District, in the above entitled cause, there is manifest error in this, to-wit:

(1) Said Court of Appeals erred in not deciding that the rights conferred on and acquired by the plaintiff-in-error by its acceptance of the charter granted to it by the State of Ohio and by its acts and proceedings under and by virtue of Sections 10128 to 10134 of the General Code of Ohio, of 1910, constitute a contract within the meaning of Section 10 of Article I of the Constitution of the United States, and constitute property within the meaning of the Fourteenth Amendment to said Constitution.

677 (2) Said Court of Appeals erred in not deciding that the plaintiff-in-error had and has a vested right to appropriate for its corporate purposes the parcel of land mentioned and described in its petition in said cause, which right was and is a contract right and a right of property within the meaning of Section 10 of Article I of the Constitution of the United States, and within the meaning of the Fourteenth Amendment to said Constitution.

(3) Said Court of Appeals erred in deciding that the parcel of land described in the petition in said cause had been devoted by the defendants-in-error to a public use, and the effect of such decision is to impair the obligation of the contract of the plaintiff-in-error with the State of Ohio and to take the property of the plaintiff-in-error without due process of law.

(4) The denial by said Court of Appeals of the plaintiff-in-error's petition for the appropriation of the parcel of land described in the petition in said cause, amounts to and effects and is a denial by the State of Ohio of an existing vested property right conferred upon the plaintiff-in-error by said State of Ohio, for which right the plaintiff-in-error had paid value and upon the faith of which it had invested money and incurred obligations; and such denial amounts to and is an impairment of the obligation of the plaintiff-in-error's contract with the State of Ohio and results in depriving the
678 plaintiff-in-error of its property without due process of law and in depriving it of a right, privilege and immunity secured to it by the Constitution of the United States and in depriving it of the equal protection of the law as guaranteed to it by said Constitution.

(5) In said cause there was erroneously admitted in evidence against the objection and exception of the plaintiff-in-error certain evidence tending to contradict and falsify certain deeds recorded upon the public records of the county wherein the parcel of land mentioned in the petition in said cause was located by showing that the Northern Realty Company was not the owner of the parcel of land mentioned in said petition at the time of the filing of said petition; and said Court of Appeals erred in not reversing the order or judgment of the trial court by reason of said error; and as a result of the erroneous admission of such evidence the plaintiff-in-error has been deprived of its right to appropriate said parcel for its corporate purposes and has been thereby deprived of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and has been denied the equal protection of the laws guaranteed to it by said Constitution. The parcel of land in question was conveyed to the Northern Realty Company by Henry A. Everett,, and upon the trial of said cause during the examination of a witness on behalf of the defendants-in-error the following occurred:

679 "Q. Do you know who paid the consideration——

(Objected to.)

for the property purchased at that time and deeded by Jeremiah Millbank, by his executor and executrix to Henry A. Everett?

Objected to.

The Court: How could you claim that was material?

Mr. Mather: We expect to show that the Northern Ohio Traction and Light Company has always owned this property. That it was not the property of the Northern Realty Company; that it was purchased originally by the Akron, Bedford and Cleveland Rail-

ad Company and that Henry A. Everett was the bare and naked
ıstee of the legal title. That later the Northern Ohio Traction
Light Company succeeded to all the property rights of The Akron
edford and Cleveland, and owned this property long before this
it was instituted, and will follow that up by development of this
entical property, for identically the same purpose for which they
e seeking to appropriate it. The property was never conveyed by
enry A. Everett until he conveyed it less than a month before this
it was commenced.

The Court: You may answer the question.

Plaintiff excepts.

A. The property was paid for by the A. B. C. Railroad.

Mr. Mather:

Q. By the A. B. C. Railroad, you mean what?

A. The Akron Bedford and Cleveland Railroad.

80 Judge Davis: We don't want to interpose an objection to every question. We wish it understood we object to this hole line of this testimony, and have our exception.

The Court: Yes."

(6) In said cause there was erroneously admitted in evidence gainst the objection and exception of the plaintiff-in-error certain vidence tending to show that subsequent to the filing of the plain-iff-in-error's petition in said cause the defendant-in-error The Northern Ohio Traction and Light Company claiming to act under egal authority vested in it by the State of Ohio (but in fact without uch legal authority) had utilized the parcel of land described in he petition in said cause in connection with a power plant, which tilization was claimed to be for a public use of the same character s that for which the plaintiff-in-error seeks to appropriate said par-el of land; and said Court of Appeals erred in not reversing the rder or judgment of the trial court by reason of said error; and as result of the erroneous admission of such evidence the plaintiff-n-error has been deprived of its right to appropriate said parcel or its corporate purposes and has been thereby deprived of its roperty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and has been denied the equal protection of the laws guaranteed to it by said Con-titution.

Upon the trial of said cause during the examination of a
81 witness on behalf of the defendant-in-error the following occurred:

"Q. Now Mr. Lahr, what expenditures, if any, have been made by the Northern Ohio Traction and Light Company in the aggregate in the development of the Gorge property for power purposes, both as to steam and hydroelectric plants, and all appurtenances?

Objected to.

Mr. Frank: I wish to direct the attention of the Court to a ques-tion which was raised by the stenographer. The court has said

we might have our objection and exception to all of this line of testimony, but the stenographer says that without your specific direction he won't put in the respective objections after the questions.

The Court: Give them an objection and exception to all this line of examination.

Stenographer: Insert it in the record?

The Court: Yes to this line of examination with reference to what has been done since the petition has been filed in the case.

Mr. Frank: And the ownership of this property by the traction company?

The Court: Yes, you may have your exception to that too.

Mr. Mather:

Q. What do you say Mr. Lahr?

Objected to—objection overruled—plaintiff excepts.

682 A. The expenditures up to January 1, 1914, were $1,979,549.68.

Q. That included only the development of the property?

Objected to—objection overruled—plaintiff excepts.

A. That included the power station.

Q. Both power houses?

Objected to—objection overruled—plaintiff excepts.

A. Yes.

Q. And the dam?

Objected to—objection overruled—plaintiff excepts.

A. Yes.

Q. And the flume?

Objected to—objection overruled—plaintiff excepts.

A. Yes, everything.

Q. Does it include transmission lines?

Objected to—objection overruled—plaintiff excepts.

A. Yes, sir, and sub stations."

(7) The operation and effect of said order or judgment is to authorize and allow the defendants-in-error to take the property of the plaintiff-in-error for a private use and without compensation in violation of the Constitution of the United States and further violates said Constitution in that it makes the parcel of land involved in his cause paramount to instead of subservient to the public welfare and makes it not subject to the power of eminent domain, to which power all property is subject by the terms and intent of said Constitution.

683 (8) Said order or judgment is indisputably contrary to the evidence and without any evidence to support it and was made arbitrarily and in such manifest abuse of power as to make it wholly void as having been made without due process of law.

(9) Said Court of Appeals erred in giving judgment for defendants-in-error and in refusing to give judgment for the plaintiff-in-error.

Wherefore, and for divers other reasons upon which the said judgment or order was made, the plaintiff-in-error prays that said judgment or order may be reversed, and that the plaintiff-in-error be restored to all things it has lost by reason thereof.

COLLIN, WELLS AND HUGHES,
Attorneys for Plaintiff-in-Error.

684 [Endorsed:] 80. Court of Appeals of the State of Ohio, Eighth District. The Cuyahoga River Power Company, Plaintiff-in-Error, against The Northern Realty Company, and The Northern Ohio Traction & Light Company, Defendants-in-Error. Assignment of Errors. Filed Sep. 21, 1915. Court of Appeals, Summit County, Ohio. B. C. Garman, Clerk. Collin, Wells & Hughes, Attorneys for Plaintiff-in-Error, Office and P. O. Adress, 120 Broadway, Borough of Manhattan, New York City.

685 Summit County, Court of Appeals.

Docket and Journal Entries.

May 15, 1914. Petition in Error, Precipe, Transcript of Common Pleas Court, Petition in Error, Precipe, Transcript of Probate Court, Summons, Depositions for Plaintiff, Motion, Def't, Bond, Bill of Exceptions, 3 Journal Entries filed.

May 15, 1914. Summons in Error issued to Sheriff Fergusson.

May 19, 1914. Summons in Error returned, "and I served the same on May 18, 1914, by personally handing a true and certified copy of this writ to Roy Nesbitt and by delivering a like copy to Freeman T. Eagleson of the partnership of Rowley, Mather & Eagleson. David R. Fergusson, Sheriff."

March Term, 1914. The plaintiff on its application has leave by July 15th, to file brief in reply to defendant's brief. Jl. 1-107.

May 28, 1914. 3 Briefs, Plaintiff in Error, filed.

June 25th, 1914. 3 Briefs, Defendant in Error, filed.

June 25th, 1914. Acceptance of Copy, filed.

August 11, 1914, plaintiff's Brief in Reply, 4 copies, filed.

Sept. Term, 1914. This cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings, and the transcript of the record in the court of common Pleas, and was argued by counsel and submitted to the court; on consideration whereof the judgment of said court of Common Pleas is affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error. It is therefore considered that said defendant in error recover of said plaintiff in error its costs herein. Ordered that a special mandate be sent to the Common Pleas Court to carry this judgment into execution. To which judgment and

order of the court and to each and every part thereof plaintiff in error here and now duly excepts. Jl. 1-150.

January 29, 1915. Transcript and original papers taken to Supreme Court.

April 14, 1915. This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Summit County to certify its record in the above entitled case to the Supreme Court of Ohio, for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said court of Appeals to certify its record in said cause to this Court for review, and said motions were argued by counsel and submitted to the court and the court having considered the same does find that this court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio. It is, therefore, ordered and adjudged that said motion to dismiss said petition in error, be and it is hereby, sustained, and said petition in error is dismissed;
686 and that the said motion to direct the Court of Appeals to certify its record to this court be, and it is hereby, overruled. It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $—.

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Records of said court, to-wit: From Journal No. 27, page 65.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Supreme Court this 30th day of March, A. D., 1915. Frank E. McKean, Clerk, By Seba H. Miller, Deputy. (Seal). Jl. 1-158.

Sept. 20, 1915. Petition for Writ of Error, Writ of Error, Assignment of Error, Bond, and Citation, filed.

687 STATE OF OHIO,
Summit County, ss:

I, Bert C. Garman, Clerk of the Court of Appeals of the County of Summit and State of Ohio, Eighth District, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing contains a true and complete transcript of the record and of all proceedings in the case of The Cuyahoga River Power

Company, Plaintiff-in-Error, against The Northern Realty Company and The Northern Ohio Traction and Light Company, Defendants-in-Error, and all of the original pleadings and papers and processes as the same remain of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Akron, Ohio, this 13 day of November, A. D. 1915.

[Seal Court of Appeals, Summit County, Ohio.]

BERT C. GARMAN,
Clerk of said Court of Appeals of Summit County, Eighth Dist. of Ohio.

Endorsed on cover: File No. 25,078. Ohio Court of Appeals, Eighth District. Term No. 342. The Cuyahoga River Power Company, plaintiff in error, vs. The Northern Realty Company and The Northern Ohio Traction & Light Company. Filed January 8th, 1916. File No. 25,078.

FILED
FEB 26 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO

BRIEF FOR PLAINTIFF-IN-ERROR

WILLIAM Z. DAVIS, Columbus, O.
JOHN L. WELLS,
CARROLL G. WALTER, } New York
Counsel for Plaintiff-in-Error

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Supreme Court of the United States,

OCTOBER TERM, 1916.

THE CUYAHOGA RIVER POWER COMPANY, *Plaintiff-in-Error,* *against* THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, *Defendants-in-Error.*	No. 342.

ERROR OF THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

This is a writ of error to review a judgment of the State Court denying and depriving the plaintiff-in-error of its right to acquire, by an exercise of the power of eminent domain duly granted to it by the State, a parcel of land needed by it for the construction and maintenance of a hydro-electric plant upon the Cuyahoga River in the State of Ohio.

The record is large, and, by reason of the absence of any findings or opinions, is somewhat in need of elucidation. But stripped of its mass of unimportant detail the situation it presents is simply this: The plaintiff-in-error

being duly organized as a corporation with the power of eminent domain commenced this proceeding against The Northern Realty Company to acquire the land in question. Subsequently, and during the pendency of the proceeding, the land was conveyed to The Northern Ohio Power Company, a "dummy" of The Northern Ohio Traction and Light Company, and in its name and under its charter there were erected upon the land a dam and two power plants, which, at the time of the trial, were claimed to be owned by the Traction Company and were being utilized for the generation of power for use in the Traction Company's business. By other decisions of the Supreme Court of Ohio it is settled that this "dummy" had no power to appropriate property for a public use or even exist as a corporation. But the State court in this case gave effect to the claim that the subsequent steps mentioned above constituted a devotion of the land to a public use, and held that by reason of such devotion the plaintiff-in-error could not acquire the land. These subsequent steps in large part, were taken after the Ohio Public Service Commission Act became effective on June 30, 1911, three years after the plaintiff-in-error obtained its charter, and were necessarily governed by that subsequent statute, to which the State court necessarily gave effect.

The question here presented is whether the charter rights of the plaintiff-in-error can be thus defeated consistently with the Federal Constitution.

It was specially set up and claimed below that under a contract with the State, resulting from its acceptance of the State's grant, the plaintiff-in-error had a *vested right* to acquire the land in question and possess and utilize it in the construction and maintenance of its plant, and that

such right is a contract right and a right of property guaranteed it by the Constitution of the United States and the Fourteenth Amendment thereof.

It was further set up and claimed that the use asserted by the defendants-in-error is not a public use, and that if the alleged devotion were recognized and sustained it would constitute an impairment of the plaintiff-in-error's contract and a taking of its property for a private use and without compensation, in violation of its rights under the Constitution of the United States and the Fourteenth Amendment thereof.

Upon the ground that the State Court has denied the Federal rights so asserted and given effect to subsequent legislative action impairing the plaintiff-in-error's contract, the case is brought here under Section 237 of the Judicial Code, the writ of error having been allowed by Mr. Justice PITNEY on September 9, 1915.

In *Columbia Water Power Co.* v. *Columbia El. St. Ry. L. & P. Co.*, 172 U. S., 475, 487, 488, the statutory jurisdiction of this court over judgments of the State courts was analyzed as embracing three classes, viz.:

> "(1) 'Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;'
>
> "(2) 'Where is drawn in question the validity of a statute of, or *an authority exercised under, any State* on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is *in favor of their validity;*'
>
> "(3) 'Or where *any title, right, privilege or immunity is claimed under the Constitu-*

tion, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against the title, right, privilege or immunity specially set up and claimed* by either party under such Constitution, statute, commission or authority.' "

The present case comes within both the second and third of these classes. The denial of the plaintiff-in-error's right to acquire the land is a decision against a title, right, privilege or immunity specially set up and claimed by the plaintiff-in-error under the Constitution of the United States, and is thus within the third class. The sustaining of the defendants-in-error's alleged devotion of the land to a public use is a decision in favor of an authority exercised under the State, the validity of which was drawn in question by the plaintiff-in-error on the ground that it was repugnant to the Constitution of the United States, and is thus within the second class.

Nature of the Proceeding.

Before entering upon a statement of the facts, the nature and character of the proceeding in which the judgment was rendered should be explained.

The Constitution of Ohio requires that the compensation to be paid for property taken for a public use shall be assessed by a jury (Article I, Section 19); and the statutes invest the Probate Courts with jurisdiction "to make inquests of the amount of compensation to be made to the owners of real estate appropriated by any corporation legally authorized to make such appropriation" (*Ohio General Code*, 1910, Section 10492).

The statutes further provide that when the taking is by a corporation, it shall file a petition with the Probate Judge of the county in which the property is situated, which petition may include any number of parcels in that county, but the owner of each parcel is entitled to a separate trial (*Id.* §§ 11042, 11043, 11048). After service of the summons, and preliminary to the impaneling of the jury, the Probate Judge is required to hear and determine four "preliminary" questions specified in the statutes, viz.: 1.—The existence of the corporation; 2.—Its right to make the appropriation; 3.—Its inability to agree as to the compensation to be paid for the property; 4.—The necessity for the appropriation. (Id. §§ 11039, 11046.)

If the judge determine these questions for the corporation, a jury is then impaneled and the compensation assessed. (Id. §§ 11047 *et seq.*)

A review of an adverse determination by the Probate Judge may be had in the higher courts. (*P. C. & T. R. R. Co.* v. *Tod*, 72 Ohio St., 156.)

The case at bar originated in a petition of the kind above described which was filed by the plaintiff-in-error in the Probate Court of Summit County.

The petition was filed on January 20, 1911, against The Northern Realty Company (Record, p. 2). Over three years were consumed in the disposition of various technical and dilatory motions. When, in March, 1914, the case finally came on for hearing upon the four questions above mentioned, The Northern Ohio Traction and Light Company was, upon its own motion, admitted as a party defendant (Rec., pp. 307, 20). It thereupon appeared and participated in the hearing through the same counsel who had theretofore represented the Realty Company.

The statutes do not provide for any pleadings other than the petition, nor for the framing of any issue, but at the opening of the case counsel for the defendants stated (Rec., p. 20):

> "Our defense is that this property is owned by The Northern Ohio Traction and Light Company, a public service corporation, and that the use which plaintiff seeks to make is entirely destructive of, and inconsistent with, the use for which it is required, and for which it has been developed, and is now being utilized by the owner."

After hearing evidence, the trial court dismissed the petition, thereby sustaining the defense thus stated and denying and depriving the plaintiff-in-error of its right to acquire the land; and the judgment under review is a judgment affirming that dismissal.

There are no findings of fact and no opinion or other statement of the grounds of the State Courts' decision.

Facts.

The plaintiff-in-error (hereinafter called the "plaintiff") was incorporated in 1908, under the laws of Ohio, particularly a statute enacted by the State Legislature in 1904 (Ohio Laws, Vol. 97, p. 300, formerly designated as Sections 3878 *et seq.* of the Revised Statutes, and now contained in Sections 10,128 to 10,134 of the Ohio General Code of 1910), the material portions of which are as follows:

> "SECTION 10128.—Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this State to raise and maintain a head of water, or for constructing and maintaining

canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, *may enter upon any private land* for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and MAY APPROPRIATE SO MUCH THEREOF AS IS DEEMED NECESSARY for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid.

"SECTION 10129.—Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations."

"SECTION 10132.—Such company or companies for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this State."

This statute was construed and its validity upheld by the Supreme Court of Ohio in a case decided January 21, 1908, shortly prior to the plaintiff's incorporation, and it was then and there adjudicated, by the highest court of the State, that the use specified in the statute is a *public use*, and that corporations organized thereunder possess the power of eminent domain and have the right to appropriate such property as is necessary for their corporate purpose.

White v. *Little Miami Light, Heat & Power Co.*, 77 Ohio St., 633, affirming a judgment of the Circuit Court of Clermont County, which affirmed, upon the opinion of the Probate Court, a judgment of the Court of Common Pleas of that County affirming a judgment of the Probate Court of that County. See Opinion of Probate Court in 5 Ohio *Nisi Prius* Reports (N. S.) 204, printed also in the Appendix to this brief.

See, also:

Mt. Vernon Cotton Co. v. *Alabama Power Co.*, 240 U. S., 30, 32.

The plaintiff's articles of incorporation, filed on May 29, 1908, set forth its corporate purpose as follows:

> "Said corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating dams *in the Big Cuyahoga River in the State of Ohio*, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintain-

> ing a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes;" &c. (Rec., p. 21).

Section 8625 of the Ohio Code provides that, if the corporation be formed for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must set forth the termini of the improvement and the counties in or through which it or its branches will pass. And in accordance with this provision the plaintiff's articles further state:

> "Said company's improvements are to begin at the confluence of the Big Cuyahoga River and the Little Cuyahoga River below the City of Akron, Summit County, Ohio, and extend along said Big Cuyahoga River through the County of Summit to a point where said Big Cuyahoga River crosses the line between Summit and Portage Counties." (Rec., pp. 21, 22).

The plaintiff's charter thus specifically locates its proposed plant *upon the Cuyahoga River between definitely fixed termini* and makes the river itself, between the specified *termini*, the plaintiff's *right of way*.

The filing of these articles of incorporation was followed on June 3, 1908, by the due organization of the corporation by subscriptions to its capital stock and the election of officers and a board of directors (Rec., pp. 30-35). And the settled law of Ohio is that on that date, at the latest, its corporate rights and powers *vested* and it then

became entitled to exercise all the rights and franchises specified in its charter.*

Among these rights and franchises, as appears from the statute and articles of incorporation quoted above, was the right or franchise of eminent domain for the appropriation of such lands as it deemed necessary for its corporate purpose.

After the election of the Board of Directors, and on June 3 and 4, 1908, the plaintiff, by resolution of its said Board, adopted a development plan made by its engineers, and it thereby *located* its proposed improvement upon definitely described parcels of land (Rec., pp. 35-37). This plan provided for the construction of a dam in the Cuyahoga River and other appliances for converting into electric energy the water power obtained from the fall of the waters of the river. The plaintiff also adopted a resolution setting forth the purpose of the company and stating *that "it is necessary and essential, for the purposes aforesaid, to appropriate and condemn, and this company does hereby appropriate and condemn, each and all of the following described real*

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* Corporations are formed in Ohio by the filing of articles of incorporation with the Secretary of State (*Ohio General Code*, §§ 8625, 8626). Upon such filing the persons who subscribed the articles, their associates, successors and assigns, are deemed a body corporate with power to act as pointed out in the statutes (*Id.*, § 8627; *Ashtabula & New Lisbon R. R. Co.* v. *Smith*, 15 Ohio St., 328); and in a number of cases the Supreme Court of the State has said that these powers fall into two classes—such as may be exercised before and such as cannot be until after the election of directors. "Among the former is the right to receive subscriptions to the capital stock, and the election of directors; and among the latter is the location and construction of the proposed road * * *. The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors." *Powers* v. *R. R. Co.*, 33 Ohio St., 429, 432; *Ashtabula &c. R. Co.* v. *Smith*, 15 Ohio St., 328, 334. See, also, *Parkside Cemetery Association* v. *Cleveland, Bedford & Geauga Lake, Traction Co.*, 93 Ohio St., 161; 112 N. E., 596; *American Ball Bearing Co.* v. *Adams*, 222 Fed., 967, per Mr. JUSTICE CLARKE; *Kardo Co.* v. *Adams*, 231 Fed. 950 (C. C. A., Sixth Circuit) as to the necessity of subscriptions to stock and election of directors.

property and estate for the uses and purposes aforesaid.'' Then follow the descriptions of several parcels of land, including the land involved in this proceeding (Rec., pp. 36 and 130-137 where the descriptions are set forth).

On June 5, 1908, the plaintiff filed in the Probate Court of Summit County, Ohio, a petition for the appropriation of the various parcels described in this resolution, being, of course, the parcels necessary for it to acquire in order to construct its plant (Rec., pp. 128-139).

A part of the land described in that petition and in the plaintiff's said resolution then stood in the name of Henry A. Everett as the absolute fee simple owner thereof under a deed from the executors of one Jeremiah Milbank executed December 14, 1897, (Rec., pp. 118-121) and he was one of the persons who was made a party defendant to the petition (Rec., pp. 129, 131). The Northern Ohio Traction and Light Co., one of the defendants-in-error here, was likewise made a party defendant as a person who *claimed* the ownership of said parcel (Rec., pp. 130,131). The reason for this was that, while Everett denied that the Traction Company owned or had an interest in the land, other officers of the Company said that it had such an interest (Rec., pp. 48, 49).

Certain owners of *other parcels* of land described in the petition made defense thereto; and the case was carried by successive error proceedings to the Supreme Court of Ohio, where it was decided, in January, 1912, that the plaintiff's offers to purchase the lands of *such other owners* were invalid because such other owners were not given a sufficient time to consider them.

Big Cuyahoga L., H. & P. Co. v. *Turner, Vaughn & Taylor Co.*, 85 Ohio St. 482, affirming a judgment of the Circuit Court of Summit County rendered in October, 1909, and reported in 17 Ohio Cir. Ct. (N. S.) 34.

In the meantime, the land which had stood in Everett's name was conveyed by Everett to the defendant-in-error, The Northern Realty Company by an absolute deed dated December 20, 1910, in which occurs this statement:

> "To have and to hold the premises aforesaid, with the appurtenances thereunto belonging, to the said grantee (The Northern Realty Company), its successors and assigns, *so that neither the said grantor nor his heirs, nor any other persons claiming title through or under him, shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred*" (Rec., pp. 171, 122-126; particularly p. 126).

This deed was received for record December 22, 1910, and actually recorded January 10, 1911, (Rec., p. 126).

On January 20, 1911, the plaintiff instituted the proceeding which has resulted in the judgment now under review (Rec., pp. 2, 4-7); and the prior proceeding against Everett and The Northern Ohio Traction and Light Company was thereafter discontinued upon the plaintiff's own motion* (Rec., p. 3).

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*It must here be observed that neither Everett nor the Traction Company had joined with the owners of the other parcels in making defense to the first petition and they were not parties to the proceedings by which that petition was taken up to the Circuit and Supreme Courts as noted above.

The sole defendant named in the second petition was said Northern Realty Company (one of the defendants-in-error here which is hereinafter called "Realty Company"), to which the land had been thus conveyed by absolute fee simple deed. The summons upon the petition was duly served and the defendant appeared (Rec., pp. 2-9). Various motions of a technical and dilatory character were first made, among them being a motion to dismiss upon the ground of the pendency of another proceeding for the appropriation of the same property (meaning the petition filed in June, 1908, as above stated), which motion was overruled upon its being shown to the court that the former proceeding had been discontinued by the plaintiff (Rec., pp. 2-9). The Realty Company then raised the question that the description of the property contained in the petition was not a "specific description" as required by the statute. The Probate Court decided this question in its favor on the 11th day of May, 1911 (Rec., pp. 1, 4). The case was then taken, successively, to the Court of Common Pleas of Summit County, where the judgment of the Probate Court was affirmed (Rec., pp. 11, 12); then to the Circuit Court of Summit County, where the judgment was *reversed* and the *description held sufficient* (Rec., pp. 13-15); and then to the Supreme Court of Ohio, where the judgment of the Circuit Court was *affirmed* on September 23, 1913, (See *Northern Realty Co.* v. *Cuyahoga River Power Co.*, 88 Ohio St., 616, affirming a judgment of the Circuit Court of Summit County reported in).

In accordance with the Ohio practice the case was thereupon remanded, not to the Probate Court, but to the Court of Common Pleas of Summit County (Rec., p. 15); and pursuant to

the mandate of the Supreme Court the case came on for hearing in that court upon the four preliminary questions mentioned above, on *March 20, 1914* (Rec., p. 20). The defendant had succeeded, by the interposition of a technical point, in delaying for over three years the hearing which the statute contemplates shall be had almost summarily. *The significance of this delay is manifest when it is remembered that it was during this very period that there took place the so-called devotion of the land to a public use upon which the defendants rely to defeat this case.*

Upon the hearing in the Court of Common Pleas, the plaintiff introduced its evidence upon the preliminary questions mentioned in the statute. It showed by record evidence that it had been duly incorporated and organized under the statute quoted above for the purpose therein expressed, and that its corporate existence still continued (Rec., pp. 20-38). It further showed that it had negotiated with Mr. Currie, Vice-President and General Manager of the Traction Co. (Rec., p. 75), and with Mr. Christy, President of the Realty Company (Rec., p. 46) and Vice-President of the Traction Co. (Rec., p. 283), and had made definite offers to purchase the land, and that the proceeding had been instituted only after these officers had said that *the property was not for sale* and that they *would not part with it at any price* (Rec., pp. 46, 54). It further showed, by the introduction in evidence of its duly adopted plans and by the testimony of engineers, that the land in question was not only reasonably necessary, but *absolutely indispensable* for the carrying out of its corporate purpose (Rec., pp. 52, 38-40, 245, 246).

THIS EVIDENCE ON THE PART OF THE PLAINTIFF WAS UNDISPUTED AND WHOLLY UNCONTRADICTED.

The evidence on the part of the defendants showed that the Realty Company had been (or attempted to be) organized, in November, 1909, for the sole purpose of buying and selling real estate and "maintaining a general real estate agency, and doing all things incident to a general real estate business" (Rec., pp. 210, 211); that another corporation, The Northern Ohio Power Company, had been (or attempted to be) organized on a date not disclosed; and that on January 31, 1911, ELEVEN DAYS AFTER THE COMMENCEMENT OF THIS PROCEEDING, the parcel of land here involved (along with other lands) had been conveyed by said Realty Company to said Northern Ohio Power Company. This deed, also, conveys an absolute fee simple title (Rec., pp. 147-151; particularly p. 150).

The defendants also introduced evidence tending to show that the consideration for the conveyance from Milbank's Executors to Everett had been paid by the Akron, Bedford, and Cleveland Railroad, the alleged predecessor of the Traction Company (Rec., p. 57); that Everett had executed some writing, not produced but claimed to have been lost, by which he agreed (so one witness testified) to hold the land in trust for the use and benefit of the Akron, Bedford and Cleveland Railroad so long as it may desire and upon its request convey the same to it "or to any person, firm, or corporation whom it may name" (Rec., pp. 58, 66, 69, 70, 115, 116); that the Traction Company had caused the Realty Company to be organized and owned or controlled all its capital stock (Rec., p. 114); and that the taxes and other carrying charges upon the land had been paid by the Traction Company (Rec., p. 66, 83, 100).

It was shown, too, and earnestly insisted by the defendants that The Northern Ohio Power Company was but another creature of the Traction Company.

The evidence further showed that up to the time of the commencement of this proceeding in January, 1911, the only use made of the land was an occasional use as an amusement resort—for "a little dancing and roller skating"; that *subsequent* to the institution of the proceeding there had been erected upon a portion of the land in controversy and upon other lands adjacent thereto a steam power house and also an auxiliary hydro-electric power plant which, at the time of the trial, were being used for the generation of power for use in the Traction Company's business; that the work of constructing these power plants had been done in the name of The Northern Ohio Power Company and while the title to the land stood in its name and that the cost of the structures had been advanced and paid by the Traction Company, which charged the same upon its books as an open account against The Northern Ohio Power Company (Rec., pp. 71, 76-79, 83, 86, 87, 90-95, 99, 151, 230, 231).

The defendants further offered to prove that on February 24, 1914, (about one month prior to the trial of this case) The Northern Ohio Power Company conveyed the land in question, along with *all* its property, rights, and franchises, to the Traction Company. The deed itself was excluded from evidence (Rec., p. 151); but the court allowed testimony that the only consideration for the conveyance from The Northern Ohio Power Company to the Northern Company was the charging off of this book account (Rec., p. 231), and that the product of the plants was

then being used by the Traction Company (Rec., pp. 77, 78).

There was no proof, nor any offer of any proof, of any corporate resolution of either defendant or of The Northern Ohio Power Company devoting or declaring any intent to devote the land in question to power house uses or to any other use which upon any theory could be claimed to be a public use at any time prior to the commencement of this proceeding. On the contrary, the corporate records of the Traction Company introduced in evidence clearly showed that as late as February 25, 1910, "the *advisability of employing an expert for the purpose of* SECURING A SUITABLE LOCATION, devising plans, specifications, etc., for a new power house *was discussed*" and "the power committee was authorized and given *full power to employ experts* for the above mentioned purpose" (Rec., p. 68). And on December 30, 1910, a resolution was adopted authorizing the officers of the Traction Company "to *purchase* approximately 57 acres of additional property (in the vicinity of the land here involved) for the purpose of improving and developing water power." (Rec., p. 69.) It was one month later, January 31, 1911, that the 40 acres here in controversy were conveyed by the Realty Company to The Northern Ohio Power Company; and it was subsequent to that date that the power houses now being used by the Traction Company were constructed.

Despite the uncontradicted proof of the plaintiff mentioned above, *and despite this clear showing by the defendants' own evidence that the alleged devotion of the land to power house uses was accomplished by means of a "dummy" and did not occur until long after the plaintiff had acquired its grant from the State,* the Court of Common Pleas, on May 1, 1914, rendered a

judgment dismissing the plaintiff's petition *without opinion* (Rec., p. 307).

The plaintiff thereupon filed its petition in error to review said judgment, and therein claimed its constitutional rights (Rec., pp. 308-310). Upon that petition the judgment was reviewed in the Court of Appeals, Eighth District, of the State of Ohio. That court affirmed the judgment *without opinion* (Rec., p. 311).

The plaintiff thereupon sought a further review in the Supreme Court of Ohio, again setting up its claims under the Federal Constitution (Rec., p. 312), but that court declined to take jurisdiction, *delivering no opinion* (Rec., p. 319).

The present writ of error was then sued out, the writ being directed to the Court of Appeals as the highest court of the State in which a decision could be had.*

Specification of Errors. Questions Presented.

Briefly summarized, the plaintiff's claims are:

(1) that, by its incorporation for the purpose of constructing and maintaining a hydro-electric

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* By an amendment to the Ohio Constitution adopted in 1912 the Circuit Courts were abolished and a Court of Appeals was established in each of the eight appellate districts into which the state was divided. The judgments of the Court of Appeals were made final except that the Supreme Court might review its judgments in certain cases.

The procedure adopted by the plaintiff-in-error of applying to the Supreme Court for a review of the judgment of the Court of Appeals in this case and then obtaining a writ of error to the Court of Appeals after the State Supreme Court had declined to take jurisdiction of the case, has been approved by this court in *Cleveland &c. Ry. Co.* v. *Dettlebach*, 239 U. S., 588, where a judgment of the Court of Appeals was reviewed and reversed by this court after the Supreme Court of Ohio had declined to review the judgment. See, also, *Stratton* v. *Stratton*, 239 U. S., 55, where a writ of error to the Court of Appeals was dismissed because the power of the Supreme Court of Ohio to review the judgment had not been first invoked; and *Second Nat. Bank of Cincinnati* v. *First Nat. Bank of Okeana*, decided Feb. 5, 1917, where a writ of error to the trial court was dismissed because the writ should have been directed to the Court of Appeals.

plant upon the Cuyahoga River, under a statute that expressly confers the right of eminent domain for the acquisition of the lands necessary to carry out that purpose, it accepted the State's grant and thereby obtained a contract and vested property right or franchise to acquire *in invitum* the lands necessary for that purpose and then construct and maintain the plant, of which right it cannot be deprived consistently with the contract and due process clauses of the Federal Constitution;

(2) that the defendants' asserted devotion of the land to a public use, being legislative in character and having been given effect by the State court, constitutes a subsequent exertion of the legislative power of the State and hence has, by virtue of State authority, the force of a State law that impairs the obligation of the plaintiff's contract;

(3) that in accomplishing the impairment of the plaintiff's contract the State court also gave effect to the Ohio Public Service Commission Act of June 30, 1911;

(4) that the defendants' acts constitute, also, a taking of the plaintiff's property without compensation, notice or legal proceedings, and for a private use, which taking has been sanctioned and sustained by the State court, and the plaintiff has been thus deprived of its property without due process of law;

(5) that under its charter, as properly construed, the plaintiff has the right to acquire the land even though it were lawfully devoted to a real public use.

The errors relied upon are that the State court has denied each and all these various claims.

The absence of any findings or opinion makes it impossible to know the precise ground upon which the State courts proceeded. But construing the judgment in the light of the questions the court was called upon to determine and of the evidence adduced upon them, it is apparent that the State court necessarily has denied the Federal rights so asserted by the plaintiff.

The only question before the court was *whether or not the plaintiff had a right to acquire the land that constituted a contract and property right;* for slight reflection will suffice to show that the questions of corporate existence, right to appropriate, inability to agree, and necessity for the appropriation, as well as the question as to the effect of the defendants' asserted devotion of the land to a public use, are but *separate elements of that single ultimate question, i. e., mere premises from which the existence of the asserted Federal right is to be deduced;* and the Supreme Court of Ohio itself, in speaking of the four preliminary questions mentioned in the statute, has said that "whether denied or not they do not present issues of fact, but are *conditions precedent, prescribed by the legislature, to the right of eminent domain,* or to the exercise of such right, and the determination of them by the probate judge is not a trial within the meaning of the statute relating to motions for new trial" (*P. C. & T. R. R. Co.* v. *Tod,* 72 Ohio St., 156, 166). It has also referred to the question of the right to appropriate as "a mixed question of law and fact" (*State* v. *Judges,* 69 Ohio St., 372, 381).

Thus, the hearing in the State court was but *an inquest or inquisition as to the existence of the plaintiff's asserted Federal right, i. e.* its charter right to acquire the land, and the judgment of dismissal, either actually or by necessary effect,

denies the existence of that right. In other words, the Federal question was presented and must have been decided adversely to the plaintiff; and the precise ground upon which the State court based its denial is, therefore, immaterial; for under the circumstances here disclosed this court is not bound by any finding of the State court and must examine the entire record for itself, not only in order to determine whether there is evidence to support any adverse finding of the State court, but, also, in order to determine WHAT FACTS MIGHT REASONABLY BE FOUND THEREFROM WHICH WOULD FURNISH A BASIS FOR THE ASSERTED FEDERAL RIGHT (*Carlson* v. *Curtiss,* 234 U. S., 103, 106; *Southern Pacific Co.* v. *Schuyler,* 227 U. S., 601, 611; *Cedar Rapids Gas Co.* v. *Cedar Rapids,* 223 U. S., 655, 668; *Kansas City Southern Ry.* v. *Albers Com. Co.,* 223 U. S., 573, 591; *Norfolk & Western Ry. Co.* v. *West Virginia,* 236 U. S., 605, 609; *Northern Pac. Ry. Co.* v. *North Dakota,* 236 U. S., 585, 593; *Cresswill* v. *Knights of Pythias,* 225 U. S., 246, 261).

Indeed, a decision upon the Federal question so necessarily controls the determination of the case that the jurisdiction of this court would not be defeated even if the State court had actually placed its decision upon some matter of local or general law (*Gaar, Scott & Co.* v. *Shannon,* 223 U. S., 468, 471; *West Chicago Railroad* v. *Chicago,* 201 U. S., 506, 519, 520). But there is, in truth, no State question upon which the State court could have rested its judgment without denying the Federal rights, for even though some of the underlying questions presented to the State court, such as corporate existence and inability to agree, might be State questions when considered abstractly and in and of themselves, yet inasmuch as they involve and concern a subject of Federal

jurisdiction, viz., an asserted contract and property right which is alleged to have been impaired and taken, they must be considered and reviewed here independently of the assumed action of the State court with reference to them (*Cornell Steamboat Co.* v. *Phenix Construction Co.*, 233 U. S., 593, 599).

Aside from this, even if it be assumed that the State court *may* have decided the case upon a State ground (and, for example, dismissed the petition upon the sole ground that the plaintiff had not shown inability to agree), this fact "affords no basis for saying that the case *was* decided on such ground," and "mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view therefore it was considered and decided in that aspect" (*St. Louis & Iron Mountain R.* v. *McWhirter*, 229 U. S., 265, 276).

The record, however, does not even disclose the potentiality of the case having been decided upon a non-Federal ground, for the defendants' asserted devotion of the land to a public use was prominently put forward as a complete and final bar to the plaintiff's right to acquire the land (Rec., p. 20). That issue was clearly made upon the record, the judgment as actually entered is a final adjudication against the plaintiff upon *all* the issues, and, upon familiar principles, such judgment (aside from its reviewability here on writ of error) makes that issue, as well as all others, *res adjudicata* against the plaintiff.*

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* The principle of *res adjudicata* appears to be fully recognized by the Ohio courts.

In *Petersine* v. *Thomas*, 28 Ohio St., 596, 600, 601, the court quoted from *Fischli* v. *Fischli*, 1 Black, 360, as follows:

"Whenever a matter is finally determined by a competent tribunal, it is considered at rest forever. And this principle

The denial of the plaintiff's asserted Federal right is, therefore, complete and permanent unless the judgment under review be reversed by this court.

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embraces not only what was actually determined, but every other matter which the parties might have litigated in the case."

and then added:

"This principle is of general application. The repose of society, in some degree, depends upon its proper application and enforcement.

"This rule will not affect any right secured to a party by law in matters of set-off, counterclaim, or cross-action. All matters of action and defense coming properly within the scope of the suit or action will be put at rest by the final determination of the action or suit, unless excepted by some provisions of law. 27 Ohio St., 233."

In *Avery* v. *Vansickle*, 35 Ohio St., 270, 274, it was said:

"There is no doubt that a former judgment upon the merits of the case is a bar to any subsequent action between the same parties or their privies upon the same cause of action, and conclusive *not only as respects questions actually decided, but as to all others involved in the issue as made.*"

In *Shoemaker* v. *Cincinnati*, 68 Ohio St., 603, 612, the principle was said to be "of universal application."

In *Railroad Co.* v. *Smith*, 54 Ohio St., 562, it was said (syllabus):

"A judgment rendered upon a finding of the issues in an action is conclusive, as between the parties, upon *all the material facts involved*, and they cannot be contested in any subsequent proceeding in the same action, so long as the judgment remains in force."

In *City of Toledo* v. *Preston*, 50 Ohio St., 361, a proceeding in a probate court for the assessment of damages sustained by abutting property owners on account of the change of grade of a street in which the jury returned a verdict of "no damages" was held to be a bar to a subsequent action by the property owner to recover such damages, despite the claim (substantiated by an order made by the probate court after the termination of the proceeding) that the jury had returned this verdict *solely in consequence of the court's instruction that the property owner had not filed his claim for damages within the time prescribed by statute.* The court stated that even though the verdict of the jury may have been in obedience to an erroneous charge of the court, "it is nevertheless their verdict and binding on the parties until set aside, either by the probate court or some one of the superior courts vested with power to review its proceedings; and this would be so even if the claim of the defendant in error for damages caused by the improvement should be regarded as in the nature of a claim for property taken and appropriated for a public use."

It is obvious, therefore, that the plaintiff could not commence a new proceeding to acquire the land in question without the well-grounded fear of being met by a plea of *res adjudicata;* and in view of this fact the effect of the judgment under review as a denial of the plaintiff's asserted Federal rights is apparent.

The errors relied upon to obtain this reversal have been summarized above and are more completely developed in the points of the argument which follow. The detailed assignments will be found at pages 327 to 331 of the record.

POINT I.

By virtue of a grant from the State, the plaintiff obtained, at the time of its organization, a vested right or franchise to acquire the land in controversy by an exercise of the power of eminent domain.

As already pointed out, the uncontradicted evidence shows that the plaintiff is a corporation specifically located by its charter and the statute (General Code, Sec. 8625) upon the Cuyahoga River and duly organized for the purpose specified in Section 10128 of the Ohio Code. That section (quoted on pp. 6, 7, *ante*) expressly grants to such corporations the right to

> "enter upon any private land • • • and • • • appropriate so much thereof as is deemed necessary"

for their corporate purposes. And the right of such corporations to make such appropriations has been sustained by the highest court of the State.

> *White* v. *Little Miami L. H. & P. Co.*, 77 Ohio St., 633, *ante*, p. 8.

The plaintiff "deems" the land in controversy to be necessary for its purpose and has expressly determined and declared that necessity (Resolu-

tion of June 4, 1908, Record, p. 36). The necessity is further shown by the uncontradicted testimony of engineers that the land is *indispensable.* (Rec., pp. 52, 38-40, 245, 246.) In fact, the land constitutes the bed and banks of the Cuyahoga river for a distance of about a mile and three-quarters within the limits of the plaintiff's right of way as expressly determined by its articles of incorporation (Rec., pp. 50, 51, 57, 80, and Deft's Ex. J. opposite p. 305). It is within "the express terms of the grant" and the grant cannot be fulfilled unless the plaintiff may acquire it.

So far as "inability to agree" as to the compensation to be paid is concerned, it is sufficient to say that long and repeated negotiations for the purchase of the land were carried on by the plaintiff's agents with certain individuals who were officers of both the Realty Company and the Traction Company and these individuals emphatically announced that there was "nothing doing" (Rec., p. 46) and that "they would not part with the property at any price" (Rec., p. 46).

There can be no doubt, therefore, of the plaintiff's plain right, secured by express grant from the State, to acquire the land by an exercise of the power of eminent domain, which right was complete and perfect the moment the plaintiff accepted the State's offer by organizing under the statute.

The defendants' arguments in the courts below rested very largely upon the assumption that the plaintiff's incorporation and its adoption of its plan of development vested it with no rights in, to, or against the land in controversy—that no rights whatever are acquired prior to the time a judgment of condemnation is entered and the assessed compensation is paid. This assumption, it may be noted in passing, is one which has been

elsewhere indulged concerning this very plaintiff (See *Cuyahoga River Power Co.* v. *Akron*, 210 *Fed.*, 524, which was reversed by this court, on March 20, 1916, in 240 U. S., 462).

We freely concede that under the Constitution and statutes of Ohio the title of the private owner to land appropriated under the power of eminent domain does not pass to the condemning corporation until the compensation of the private owner has been assessed and paid pursuant to the verdict of a jury and the judgment of a court.

> *State ex rel.* v. *Cincinnati*, 17 Ohio St., 103;
> *Wagner* v. *Railway Co.*, 38 Ohio St., 32, 36.

But it is not the private owner's title to the land that we here assert and seek to protect. The right we here assert, the "title, right, privilege or immunity" which we here set up, is the *right to acquire the title of the private owner*, or, in other words, *our franchise of eminent domain;* and we obtain this right or franchise, not from any private owner by virtue of an assessment and payment of compensation, but directly from the State itself by virtue of its grant.

The power of eminent domain is an inseparable incident of sovereignty which may be exercised at any time either directly by the State or indirectly by such agency as it may select, including "the instrumentality of private individuals incorporated for the purpose."

> *Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308, reaffirmed in
> *White* v. *Little Miami L. H. & P. Co.*, 77 Ohio St., 633, construing the identical statute under which the plaintiff here was organized.

It is *vested in the legislature* by virtue of the general grant of legislative power contained in Section 1 of Article II of the Ohio Constitution; and the legislature may delegate the power to private corporations organized for a public purpose.

Giesy v. *Cincinnati &c. Co., supra.*

The power "constitutes a condition upon which all property is holden."

Kramer v. *Cleveland & Pittsburg R. R.*, 5 Ohio St., 140, 146.

All land is always subject to an exercise of the power.

Cincinnati v. *Louisville & N. R. R. Co.*, 223 U. S., 390, 400;
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S., 685.

Or, as stated in the Ohio Constitution, all property is always "subservient to the public welfare."

Ohio Const., Art. I, Sec. 19.

In view of this provision of the Ohio Constitution and the holdings in the *Giesy* and *Kramer* cases, *supra*, it seems very clear that in Ohio, at least, the State has *a dominant or paramount title to all lands in the State*, that the private owner's title is always subservient or subject to this ever-existing dominant title of the State, and that by its grant from the State the plaintiff acquired, *ipso facto*, a real *title* to the land in question which was paramount to the title of the private owner despite the fact that compensation to the private owner must be assessed and paid before the right of possession attached. But whether the plaintiff's right be regarded as a title to the land itself or merely as a right to acquire a title

to it, is really immaterial. It is at least certain that the delegation of the power of eminent domain to a corporation is the conferring of a *prerogative of sovereignty.*

It is thus in its very essence *the grant of a franchise;* for a franchise is defined to be

> "A royal privilege in the hands of a subject."
>
> "Certain privileges conferred by a grant from government and vested in individuals."
>
> "Special privileges conferred by the government on individuals, and which do not belong to the citizens of the country generally of common right."
>
> "A particular privilege conferred by the grant of the government and vested in individuals."
>
> See *Joyce on Franchises,* §§ 1 and 2, where the definitions are collected and the authorities cited, and *State* v. *Railway Co.,* 50 Ohio St., 239, 251.

Indeed, the right to exercise the power of eminent domain frequently has been specifically designated as a franchise.

> *California* v. *Central Pac. R. Co.,* 127 U. S., 1, 40;
>
> *Parkside Cemetery Ass'n* v. *Cleveland, Buffalo & Geauga Lake Traction Co.,* 93 Ohio St., 161; 112 N. E., 596, 602, per JONES, *J.,* in dissenting opinion but not differing from the court on this point;
>
> *Brinckerhoff* v. *Newark & Hackensack Traction Co.,* 66 N. J. L., 478;
>
> *Chicago &c. R. R. Co.* v. *Dunbar,* 95 Ill., 571, 579;
>
> *Shamokin Valley R. R. Co.* v. *Livermore,* 47 Pa., 465, 468.

In *Brinckerhoff* v. *Newark & Hackensack Traction Co., supra,* it was held that the right to exercise the power of eminent domain passed under a sale of the "property and franchises" of a corporation pursuant to a statute. The Supreme Court of New Jersey said (p. 481):

> "While the act does not expressly declare that the new corporation shall have *the right to take lands by eminent domain,* it provides that the corporation organized under it 'shall be entitled to all the rights, liberties, privileges and franchises of the corporation whose property and franchises have been so sold and conveyed.'
>
> "The Union Traction Company, to whose title the defendant company has succeeded, was incorporated under the Traction Act of 1893, which gives to corporations organized under it the right to take lands necessary for the construction of their lines by condemnation. It likewise gives such companies the right and power to extend from time to time existing lines.
>
> *"This was a valuable right and franchise vested in the Union Traction Company at the time of the sale, and was as much a part of its property and franchises as the right to operate its then completed road."*

It is thus plain that from the time of its organization the plaintiff was vested with the right or franchise to acquire the land *in invitum;* from that time the land was subject or "subservient" to that right as vested in the plaintiff and was held upon the condition that the plaintiff might acquire it—might take it from the owner upon paying just compensation therefor. And from that time to this the plaintiff has been diligently and in good faith engaged in attempting to make its right and franchise effective.

POINT II.

The plaintiff's right to acquire the land in controversy is a contract right and a right to property within the meaning and protection of the Federal Constitution. It is a "title, right, privilege or immunity claimed under the Constitution."

It is of course unnecessary in this court to cite authorities for the proposition that a corporate charter, whether obtained by special act of the legislature or by incorporation under general laws, is a *contract* protected by the Federal Constitution.

What, then, is the *scope* of the plaintiff's contract? Does it include the *right to acquire* the lands necessary for the construction and maintenance of the improvement the plaintiff was formed to develop? Is that right one which is protected from impairment or deprivation by the contract and due process clauses of the Constitution?

In *Piqua Branch State Bank* v. *Knoop*, 16 How., 369, which arose in Ohio and is peculiarly appropriate here,* this Court used language that is apt and controlling. Referring to the statute under which the bank had been organized, the pro-

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*This is one of the so-called "Ohio Bank Cases" in which this Court reversed a holding by the Supreme Court of Ohio that a charter is not a contract. Five of these cases were successively taken to this Court upon writ of error to the Supreme Court of Ohio, and in each of them the judgment of the State Court was *reversed* (*Piqua Branch State Bank* v. *Knoop*, 16 How., 369; *Mechanics & Traders Bank* v. *Debolt*, 18 How., 380; *Mechanics & Traders Bank* v. *Thomas*, 18 How., 384; *Jefferson Branch Bank* v. *Skelly*, 2 Black., 436; *Franklin Branch Bank* v. *State of Ohio*, 2 Black., 474). A note discussing these cases will be found in 60 L. R. A., 60. We would have supposed that the long controversy between this Court and the Supreme Court of Ohio with respect to the inviolability of corporate charters was now of merely historical interest.

visions of which were claimed to constitute a contract, it was said (p. 380):

> "The 60th section is not found in a general law, as is intimated by the Supreme Court of the State. The Act of 1845 is *general only in the sense that all banking associations were permitted to organize under it; but the act is as special to each bank as if no other institution were incorporated by it.* We suppose this cannot be controverted by any one. This view is so clear in itself that no illustration can make it clearer.
>
> "*Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract* which cannot be changed by the Legislature, where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, *and other provisions essentially connected with the franchise, and necessary to the business of the bank,* cannot, without its consent, become a subject for legislative action."

It is, of course, of no moment here that the Ohio Constitution now contains a reserved power to alter, amend or repeal; for in this case there has been no attempt to exercise that power.

Now what are the "valuable privileges" given by the plaintiff's charter "which conduced to an acceptance of it and an organization under it?" What are the charter provisions "essentially connected with the franchise and necessary to the business" of the plaintiff?

The purpose of the plaintiff's organization, as already pointed out, conforms exactly to Section 10,128 of the Ohio Code. Its articles of incorporation, moreover, specifically name the Cuya-

hoga River as the stream upon which its plant should be erected; and this designation of the *place* of its improvement was made in accordance with the express requirement of the statute (Code, Sec. 8625).

A mere reading of the statutes and articles of incorporation thus makes it plain to a demonstration that the State has granted, not a mere capacity to exist as a corporation nor yet a mere authority to build a plant somewhere upon some river, but *a specific right or franchise to construct a plant upon the Cuyahoga River between specified termini and to appropriate and use the lands necessary for the maintenance and operation of the plant;* or, in other words, a *right of way* over and along the river for the construction and operation of the plant.

The plain language of the charter, the whole intent and meaning of the grant, is that the plaintiff should have the right to erect dams, locks, raceways, &c., in and upon the Cuyahoga River and *the right to* ENTER UPON AND APPROPRIATE *the land necessary for the purpose* of constructing and maintaining these contrivances in order to develop and sell hydro-electric power. *These* are the "valuable privileges" given by the charter "which conduced to its acceptance and an organization under it." *These* are the rights and powers which are "essentially connected with the franchise and necessary to the business of the" corporation. *These* are the things which, in the language of this Court in *Pearsall* v. *Great Northern Railway,* 161 U. S., 646, 664, are "so far necessary to the full enjoyment of the main object of the charter that persons subscribing to the stock might be presumed to take into consideration, and be influenced in their subscriptions, by the fact that the corporation was endowed with

those privileges during the continuance of the charter."

The charter itself, therefore, is thus so explicit in locating the company's improvement in a specified place and in conferring the right to enter upon and appropriate that place for the construction of the plant, as to make it A SPECIFIC GRANT OF A RIGHT OF WAY *over the river between the named termini;* and if the plaintiff did not obtain by that grant a vested right to acquire the lands necessary to carry on its corporate purpose its charter really amounted to nothing.

In the well known and oft-approved case of *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1, it was held that by the charter of the Canal Company the valley of the Potomac River, from tidewater to the highest practicable point of navigation on the north branch, was *specifically appropriated* to the building of a canal, and at the time of its incorporation the company acquired, not the actual legal title to the land, but a *vested right or franchise to acquire the land by purchase or condemnation*, which could not be defeated without an impairment of the contract. The Court said (p. 144):

> "This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property; it is an incorporeal hereditament, not a legal title to the land itself, not a mere capacity or faculty to acquire and hold land, such as every individual possesses; but in addition to such capacity, it is a right or privilege, *a portion of the eminent domain vested in the corporation, to acquire the legal title to land subjected by the grant to its will*, and thus to convert the incorporeal into a corporeal hereditament, and after the franchise to choose and condemn land for any particu-

> lar public purpose, that portion of the eminent domain granted and subsisting in one corporation, cannot be bestowed upon another, to the prejudice of the former grant; *nor can any other legally acquire any such right of way or title to the land over which the franchise extends, as will hinder the former corporation in the exercise and enjoyment of its franchise.*"

In *Morris & Essex R. R. Co.* v. *Blair*, 9 N. J. Eq., 635, which involved a controversy between two railroads whose charters fixed merely the terminal point and prescribed no specific route, the Court referred to this absence of a specific location in the charter itself, and said (p. 644):

> "It is not a case, therefore, of a prior grant of a *specific route* for a railroad by the legislature to one company, and a subsequent grant of the same route to another company, without repealing the former grant, or providing for compensation. *If it were, upon principle and authority, the first company would take a vested right in the route, to the exclusion of the second. Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & Johns., 1."

It was held that when the grant had been made specific *by the corporation's adoption of a definite route* that corporation had a vested right to the route, of which it could not be deprived by a subsequent purchase of the land by another company for railroad purposes.

The decisions which follow and apply the doctrine of the cases just mentioned are too numerous to cite. Many of the more recent cases in this Court relate to grants contained in city ordinances; but there is, of course, no difference in

principle. It is the sanction and authority of the sovereign which gives the grant its vitality and effect, and it is immaterial whether the grant be contained in the Constitution* or in a statute† or in a city ordinance.‡ In each case the grant is a complete and binding contract *from the moment the State's offer is accepted* and "the grantee is thus protected in starting the enterprise" and during "the initial stages" and while "the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness."

> *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179, 193, 194.

It is settled, too, that acceptance lies in an investment of money and a change of position upon the faith of the offer.

> *Russell* v. *Sebastian*, 233 U. S., 195, 208, 210.

And that, when accepted and acted upon, the grant becomes binding, not step by step as the work proceeds, but "as an entirety, in accordance with its purpose and express language."

> *Russell* v. *Sebastian, supra*, at page 207.
> *Grand Trunk W. Ry. Co.* v. *South Bend*, 227 U. S., 544, 555, 556.

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* As in *Russell* v. *Sebastian*, 233 U. S., 195.

† As in the case at bar, *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312; *Willcox* v. *Consolidated Gas Co.*, 212 U. S., 19; *Piqua Branch State Bank* v. *Knoop, supra; Reagan* v. *Farmers L. & T. Co., infra; New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 650; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S., 674; *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S., 64.

‡ As in *Louisville* v. *Cumberland Tel Co.*, 224 U. S., 649; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S., 544; *Boise Water Co.* v. *Boise City*, 230 U. S., 85; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S., 58; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517; *N. Y. Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S., 179.

In *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S., 362, 393, the court, after stating that a corporate charter is a contract within the meaning of the Constitution, said:

> "All that is within the scope of this contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and on the other hand, *one obligation assumed by the State was that it would not prevent the company from so constructing and operating the road.*"

In *Pearsall* v. *Great Northern Railway*, 161 U. S., 646, 673, the court in speaking of the term "vested rights" said (p. 673):

> "As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, *as well as to all such rights as are necessary to the full and complete enjoyment of the original grant*, or of property legally acquired subsequent to such grant. If, for example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala* v. *New Orleans*, 2 Woods, 188."

And in the recent case of *Long Sault Development Co.* v. *Call*, 242 U. S., 272, 276, Mr. Justice CLARKE, used language exactly applicable here:

Speaking of an act that, like the statute here, authorized the company "to construct, maintain and operate dams, canals, reservoirs and the appurtenances necessary or useful for the purpose of developing water power and electrical energy" at such point or points on a specified portion of a named river as may be selected by the company, he said:

> "THE GRANTS OF THE ACT OF 1907 ARE SUCH THAT, IF IT WAS A VALID LAW, UPON THEIR BEING ACCEPTED, THEY CONSTITUTED PROPERTY OR CONTRACT RIGHTS, OF WHICH THE PLAINTIFF COULD NOT BE DEPRIVED AND WHICH COULD NOT BE IMPAIRED, BY SUBSEQUENT LEGISLATION."

The State Court, too, has long since receded from the position it took in the "Bank Cases," *supra,* and has for many years recognized that the acceptance of a State grant creates a binding contract.

> *Hamilton G. & C. Traction Co.* v. *Hamilton & L. Elec. Transit Co.,* 69 Ohio St., 402.
>
> *Railway Co.* v. *Village of Carthage,* 36 Ohio St., 631.
>
> *City of Columbus* v. *Street Railroad Co.,* 45 Ohio St., 98.

The two cases last cited were referred to by this Court in *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S., 517, as follows (p. 534):

> "That in the courts of Ohio the acceptance of an ordinance of the character of those just referred to is deemed to create a binding contract is settled. *Railway Co.* v. *Village of Carthage,* 36 Ohio St., 631, 634; *City of Columbus* v. *Street Railroad Co.,* 45 Ohio St., 98."

In the *Hamilton case, supra,* the Supreme Court of Ohio, upon full consideration squarely held that a grant of the right to occupy and use certain streets for the purpose of constructing, operating and maintaining a street railway, was a *contract* and a *vested property right* which could not be taken or impaired except upon payment of just compensation, even though the grantee acquired no fee in the soil upon which its railroad was to be constructed. In the course of the opinion it was said (p. 409):

> "But it is, we think, equally well settled that where the right is given by ordinance to a street railway company to occupy and use particular parts of certain streets, and the grant so made is accepted and acted upon by the grantee, the City authorities are thereafter, so long as said grant remains in full force, unforfeited and unrevoked, without right or authority to grant to another street railway company for like use the right to have and occupy without appropriation or the making of compensation therefor to the first grantee, *precisely the same ground or right of way first granted.* TO PERMIT THIS WOULD BE TO SANCTION AND ALLOW THE IMPAIRMENT OF THE OBLIGATION OF AN EXISTING CONTRACT BY SUBSEQUENT MUNICIPAL LEGISLATION OR GRANT. This may not rightfully be done.
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> • • • • • • •
>
> "While it is undoubtedly true that a street railway company, under a grant authorizing it to occupy and use certain streets for the purpose of constructing, operating, and maintaining thereon its street railway, *acquires no fee in the soil upon which its roadbed is constructed* and its ties and tracks are laid, *it nevertheless does acquire therein a franchise and easement, which becomes and is its private property;* and it has the right, dur-

ing the life of the grant, to the possession and enjoyment of that franchise and easement without interruption or obstruction from any other company, until such time, at least, as it may voluntarily surrender the same or be legally divested thereof by an authorized appropriation and the payment of full compensation therefor, as required by the Constitution and Laws of the State of Ohio. The right which the grantee acquires by such grant *is more than a mere license. It is a vested property right,* in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; * * *."

In *Louisville Trust Co.* v. *Cincinnati,* 76 Fed., 296, Mr. Justice LURTON (then Circuit Judge), speaking for the Circuit Court of Appeals for the Sixth Circuit in a case involving the construction and effect of a grant under the law of Ohio, said (p. 299):

> "The grant of a right to enter upon and occupy a public street with the necessary tracks, poles, wires and equipment of an electric street railway is a grant of a typical easement in property, and as such is a contract right capable, in the absence of express restrictions, of being sold, conveyed, assigned or mortgaged, and is, therefore, a right entitled to all the protection afforded other property or contract rights."

No distinction can be drawn between a grant of the right to enter upon and occupy a public street with a street railway and a grant of the right to enter upon and appropriate land for a hydro-electric plant; and the cases cited are controlling. They are clear, explicit, and decisive, in holding that the Ohio statute here involved is

an offer by the State, which was accepted by the plaintiff's organization under it and was converted, by such acceptance, into a binding *contract* and a *vested property right.* (See, particularly, *Russell* v. *Sebastian, supra*). Indeed, the decision of the State Court in the *Hamilton case, supra,* leaves but little to be said here. The plaintiff's direct grant from the State of the right to appropriate land for a hydro-electric plant upon the Cuyahoga River is fully as binding and efficacious as the grant which the Hamilton Transit Company received from the City of Hamilton. The place where the plaintiff's plant was to be located, viz., along the Cuyahoga River between the termini mentioned, is quite as definite and precise as the grant of a right to lay tracks in a specified city street. The grant was accepted and acted upon when the plaintiff completed its organization and "by its investment, had irrevocably committed itself to the undertaking." (*Russell* v. *Sebastian, supra,* at p. 210). The grant being thus accepted and acted upon, the plaintiff had acquired "a vested property right in the nature of a franchise or easement in and to the particular" lands designated in the grant, although it had acquired no fee in the soil upon which its plant was to be constructed. The analogy between the *Hamilton case* and the case here is complete.

It is furthermore exceedingly important to note that every railroad company organized in Ohio since 1852 has been organized under a general statute the same in substance as that under which the plaintiff here was incorporated, and the entire power and franchise obtained by every such railroad company is that derived from the provision of the statute that

> "Any railroad company may maintain and operate, or construct, maintain and operate,

a railroad, with a single or double track, with such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place, named as a terminus of its road" (R. S., Sec. 3270).

Ohio General Code, Section 8745.

It is this statute alone which constitutes the grant under which most of the existing railroads of Ohio were built and are being operated. The same thing is true, in a general way, of most of the railroads in other States.

Indeed, if this court should sustain the idea that the plaintiff acquired no rights as against the land in controversy, no *right to acquire* the title of the private owner, which vested in it by its acceptance of the State's offer, then the consequences are grave indeed, not only for this plaintiff, but also for every other person and corporation expending money for the erection of any public utility whatever and for the large portion of the citizens of the country who are dependent for light, heat, power, water, telephones, telegraphs and railroads upon the activities of these private companies undertaking the public service. For if the plaintiff's charter do not mean that the right to acquire the land necessary for its plant is granted to it, what does it mean? When is such a franchise acquired? Is it when the soil is actually acquired and paid for? Is it when the proposed improvement is actually constructed? Is it when the contemplated service is actually commenced? If this be so, then no right to acquire the land, no right to construct dams or string wires or lay

pipes, can ever be acquired—the State's offer of the right to acquire lands in order to build a plant in a particular river cannot be accepted at all, and the only thing which can be secured is the *right to maintain a plant already constructed.*

See

Russell v. *Sebastian,* 233 U. S., at p. 208.

There is no middle ground upon which to stand. One doctrine or the other must be applied; and if the plaintiff's claim here be not sustained, then no right to acquire the lands necessary to make the State's grant useful or effective could vest in the company during all the long years necessary for the acquisition of title and the construction of the physical works, and investors in such enterprises must take their chances as to what may happen during the interim. It is needless to say that if that be the law, it simply means that public utilities cannot be built, for it is an actual fact, repeatedly recognized by this Court, that private capital will never be invested in such undertakings if the rights of the corporation undertaking the service be subject to immediate revocation, either by legislative repeal or by the interference of other corporations seeking to utilize the same subject matter for a conflicting use, at any time before the company gets to the point of actually furnishing the service which it was formed to supply.

N. Y. Elec. Lines Co. v. *Empire City Subway Co.,* 235 U. S., 179, at p. 193;

Louisville v. *Cumberland Telephone Co.,* 224 U. S., 649, at p. 663;

Boise Water Co. v. *Boise City,* 230 U. S., 85, 90;

Owensboro v. *Cumberland Telephone Co.,* 230 U. S., 58;

Russell v. *Sebastian,* 233 U. S., 195, 208.

The case at bar is an apt illustration: The bold proposition asserted by the defendants is that they can, with impunity, destroy the plaintiff's entire enterprise simply by building power-plants *while the condemnation proceeding is pending, i. e.*, while they are holding up the plaintiff by unfounded litigation over the sufficiency of the description contained in the appropriation petition. If enterprises such as the plaintiff's can be thwarted in this way, it is plain they will never be undertaken.

Turning now to a consideration of the plaintiff's right to acquire the land in question as *property* rather than as a *contract* (a distinction which is perhaps more superficial than real), we find the authorities equally strong in support of our position.

> "This franchise, this corporate right, to select and acquire land for the authorized purposes of a corporation, is property * * *."
>
> *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio R. R. Co.*, 4 Gill & J., 1, 144, quoted *ante*, p. 33.

> "It seems to us impossible to draw a distinction between a *right of property* and a *right of acquiring property* that will make a disturbance of the latter any less actionable than a disturbance of the former. In a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it. The cup of Tantalus would be a fitting symbol for such a mockery. Our constitution recognizes no such notion."

Thus wrote Mr. Justice PITNEY for the New Jersey Court of Errors and Appeals in *Brennan* v. *United Hatters,* 73 N. J. Law, 729, 742.

And the principle has received the sanction of this court.

Coppage v. *Kansas,* 236 U. S. 1, 14.

"Property" does not consist of the corporeal object, but of "certain rights in things which pertain to persons and which are created and sanctioned by law," viz., the right of user, the right of exclusion, and the right of disposition.

Lewis, Eminent Domain (3 Ed)., Sec. 63; also Sections 64 and 65;

Pumpelly v. *Green Bay Co.,* 13 Wall., 166, 177;

Mansfield v. *Balliett,* 65 Ohio St., 451, 464, 470;

Callen v. *Electric Light Co.,* 66 Ohio St., 166, 175, 177, 178.

The "right to acquire" a parcel of land is not a title to the land itself; it is not corporeal but incorporeal and intangible. It is, however, a *franchise,* and

> "Corporate franchises * * * are legal estates, and not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation by virtue of their charter * * *."
>
> *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632, 638.

A grant of a franchise is not in point of principle distinguishable from a granting of *any other property.*

Dartmouth College v. *Woodward,* 4 Wheat, 518, 699-701, per STORY, *J.*

And a power which is a franchise is property.

West River Bridge Co. v. *Dix.*, 6 How. 507, 543.

Moreover, in the present case at least the "right to acquire" the land in question is "necessary to the full enjoyment of the main object of the charter;" and certainly it is as valuable and substantial and has as many of the attributes of property as the right of a sleeping-car company to let down its upper berths even when not sold (*Chicago, Mil. & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S., 491), the right of an abutting owner to prevent the closing of an alley (*Bowe* v. *Scott*, 233 U. S., 658), the right to compensation for damages resulting from a street grading (*Ettor* v. *Tacoma*, 228 U. S., 148, 158), the right to settle on land and remain in possession so as to perform acts necessary to the acquisition of title (*Gauthier* v. *Morrison*, 232 U. S., 452, 458), the right to erect poles and string wires for a telephone system (*Owensboro* v. *Cumberland Telephone Co.*, 230 U. S., 58, 65), the right to lay pipes or railroad tracks not yet actually laid (*Russell* v. *Sebastian, supra; Grand Trunk Western Ry. Co.* v. *City of South Bend*, 227 U. S., 544; *Rochester, etc., Co.* v. *City of Rochester*, 176 N. Y., 36; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y., 528), the right to contract for the use of property (*Ingersoll* v. *Nassau El. R. R. Co.*, 157 N. Y., 453; *Roddy* v. *Brooklyn City, etc., R. R. Co.*, 32 N. Y. App. Div., 311), the right of a stockholder to vote (*Lord* v. *Equitable Life Assurance Society*, 194 N. Y., 212), the right to light, air, and access over a city street or a country road (*Callen* v. *Electric Light Co.*, 66 Ohio St., 166; *Schaaf* v. *Railway Co.*, 66 Ohio St., 215; *Muhlker* v. *New York & Harlem*

R. R. Co., 197 U. S., 544), the right to take tolls (*Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 344, 345; *Turnpike Co.* v. *Parks*, 50 Ohio St., 568, 575; *Detroit* v. *Detroit & H. Plank Road Co.*, 43 Mich., 140, per COOLEY, *J.*), or the rights of riparian owners (*Mansfield* v. *Balliet*, 65 Ohio St., 451).

As said in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S., 649, 661, the right, however named, is property.

In this connection we call particular attention to the Ohio Supreme Court's conception of *property* as expressed in *Callen* v. *Electric Light Co.*, 66 Ohio St., 166, and *Schaaf* v. *Railway Co.*, *id.*, 215.

In *Callen* v. *Electric Light Co.*, *supra*, the owner of a lot abutting upon a city street sought to enjoin the defendant (which was acting under authority of a city ordinance) from erecting poles and wires for an electric lighting system in front of his premises. The injunction was granted enjoining the maintenance of the poles and wires and the defendant was further ordered to remove the poles and wires which had been already placed there. After referring to numerous authorities with respect to a lot owner's right in a city street, the Court said (p. 175):

> "And if, as held by these adjudications, the owner's right in the street is to be treated as property, the only remaining question is whether or not the acts of the defendant complained of constitute, in an essential degree, a taking of that property within the meaning of the constitution. *And here we inquire what is meant by the word 'property'?* If, as was once understood, and is still understood by some, it means only a corporeal thing, as a horse or a piece of land, then a

negative answer to the question would seem to follow. If, however, the true meaning is the right of property in and dominion over the specific thing, then we would seem to be led to a different answer. That the latter meaning is the true one appears now to be the settled doctrine. *Under this definition the word 'property' is held to denote certain rights in things which pertain to persons and which are created and sanctioned by law.* They are, as stated by one writer, 'the right of user, the right of exclusion and the right of disposition * * * . A person's right of property in things, therefore, consists of the right to possess, use and dispose thereof in such manner as is not inconsistent with law.' "

Upon the question whether the acts of the defendants constituted a taking, the Court said (p. 177):

"But the rule more frequently held, and, we think, the more enlightened rule, is that this limitation to the term 'taking' to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, *from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property,* for, if the right of user is an essential element of ownership, then whatever physical interference annuls this right takes property."

And also on page 178:

"And if the owner's right in the street be property, as hereinbefore defined, and as such is protected by the constitution, it inevitably follows that the attempt by a private corpo-

> ration, in order to accomplish its own private business purposes, to invade that right by placing in the street in front of the lot permanent erections which will, in any appreciable degree, impair the owner's access to the lot, or otherwise interfere with the full enjoyment of the lot for all purposes to which it is adapted, or of the street itself, such an invasion is an attempted taking; it is a diversion of the use of the street from the purposes originally designed for it, and if it can be taken at all as against the will of the owner, it must be upon the terms prescribed by the constitution."

In *Schaaf* v. *Railway Co., supra,* the doctrine of the preceding case was applied in an action by the owner of a farm to enjoin the construction and operation of an interurban electric railway over a highway in front of the plaintiff's premises. The Court enjoined the defendant from proceeding, and also directed it to remove all material and obstructions which it had placed in the highway and restore the highway to the condition in which it was at the time it commenced work.

So, too, in *Turnpike Co.* v. *Parks,* 50 Ohio St., 568, 576, it was said that "a franchise cannot be distinguished from other property," and it was accordingly held that by making a toll road a free road the franchise to collect tolls was "virtually forfeited" and this could be accomplished only by due process of law.

Certainly the "right to acquire" a particular parcel of land, the right to appropriate the land to a particular use in order to carry out a grant from the State, comes within the definition of property as laid down in these authorities. It is a right which, originally residing in the State as an incident of its own sovereignty, has been con-

ferred upon the plaintiff by the State. It is a right essential to the accomplishment of the purpose for which the plaintiff was formed. Without it, the entire charter of the plaintiff, offered to it by the State and duly accepted in the manner prescribed by law, is meaningless and useless. If the Constitution do not extend to the protection of such rights it is indeed difficult to see to what it does extend.

POINT III.

The plaintiff has been deprived of its property without due process of law, in that its property has been taken by the State, or under color of State authority, without compensation and for a private use.

The indisputable fact that the dam and power plants have been erected, within the limits of the plaintiff's right of way as fixed by its charter, upon lands that are indispensable to the exercise of the plaintiff's grant—particularly when coupled, as it is, with the decision of the State court that by reason of that fact the plaintiff cannot acquire the land—makes it clear beyond controversy that the plaintiff's property, its right to acquire the land and construct and operate its plant in the place and in the manner provided in its charter, has been TAKEN.

In *Louisville Trust Co.* v. *Cincinnati* (*ante*, p. 39), Mr. Justice LURTON said that a grant such as the plaintiff's is "a typical easement"; and in *Reeves* v. *Treasurer of Wood County*, 8 Ohio

St., 333, the Supreme Court of Ohio said "An easement is property."

And inasmuch as the entry upon the land in question and the erection of the dam and power plants has been *construed and applied by the State court so as to defeat the plaintiff's easement or franchise,* such entry was as much a taking of the plaintiff's property as the erection of the New York elevated railroads or the construction of the Park Avenue Viaduct in such manner as to interfere with the abutting land owners' easements of light, air and access to and from streets in which they owned no soil, was a taking of the "property" of such abutting owners.

> *Muhlker* v. *N. Y. & Harlem R. R. Co.,* 197 U. S., 544.

It was as much a taking of the plaintiff's property as the erection of poles and wires for an electric lighting system in the public streets of Columbus was a taking of the same easements of an abutting lot owner in that city.

> *Callen* v. *Electric Light Co.,* 66 Ohio St., 166; *ante,* p. 46.

It was as much a taking of its property as the construction of an interurban railway along a public highway was a taking of the same easements of an abutting farm owner in the country districts of Ohio.

> *Schaaf* v. *Railway Co.,* 66 Ohio St., 215; *ante,* p. 48.

It was as much a taking of its property as a grant of the right to occupy public streets with a railway system was a taking of the property of

an existing street railway which had previously obtained a similar grant.

Hamilton G. & C. Traction Co. v. *Hamilton Elec. Transit Co.*, 69 Ohio St., 402; *ante*, pp. 37, 38, 39.

In short, the cases cited make it perfectly clear that the invasion of an intangible right or incorporeal hereditament, such as an easement or the plaintiff's franchise, is a taking of property as much as the physical seizure and occupancy of another's house or bit of soil; and the owner of such easement or franchise is protected by the Constitution against its invasion even though there be no actual entry upon any soil to which the owner of the franchise has title or of which he is entitled to actual possession.

It is clear, too, that inasmuch as the taking here is for *an alleged public use* and has been accomplished under color of authority claimed to have been conferred by the State upon a so-called public service corporation for the asserted and ostensible purpose of performing franchises claimed to have been granted to it by the State, the taking is to be regarded as *the act of the State* within the meaning of the Fourteenth Amendment.

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S., 278;
Cuyahoga River Power Co. v. *Akron*, 240 U. S., 462.

And as no compensation has been paid it is settled by many decisions of this court that the taking is without due process of law, the payment of just compensation for property taken for

a public use being an essential element of due process of law.

Consolidated Turnpike Co. v. *Norfolk &c. Ry.*, 228 U. S., 326, 330;
Chicago, B. & Q. R. R. Co. v. *Chicago*, 166 U. S., 226;
Appelby v. *Buffalo*, 221 U. S., 524.

If there were no other question in the case this fact alone would necessitate a reversal of the judgment under review.

But aside from this—that is, even though the erection of the dam and power plants were not even claimed to be for a public use and were originally without any color or assertion of State authority, the taking of the plaintiff's property must nevertheless be now regarded as State action; for if that view be taken then the record presents the bald case of a deliberate taking of the property of one person by another without any authority of law, *which has been sanctioned and sustained by the decision of the highest State court.*

And in so sanctioning and sustaining this taking the State, by the judgment of its courts, has deprived the plaintiff of its property without due process of law; for the due process clause, unlike the contract clause, extends to all exertions of State power, whether executive, legislative or judicial—"to every person whether natural or juridical who is the repository of State power"; and "whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is

clothed with the state's power, his act is that of the state."

Home Tel. & Tel. Co. v. *Los Angeles,* 227 U. S., 278, 286, 290, 291;
Chicago, B. & Q. R. Co. v. *Chicago,* 166 U. S., 226, 235;
Raymond v. *Chicago Traction Co.,* 207 U. S., 20, 35;
Cuyahoga River Power Co. v. *Akron,* 240 U. S., 462.

These decisions, illustrating the extensive scope of the due process clause, clearly show that even if the acts of the defendants be regarded as the acts of private citizens *and the judgment under review be regarded as constituting the sole act of the State in this case,* it must yet be reviewed and reversed because, under that view, *such judgment in and of itself deprives the plaintiff of its property without due process of law.*

That a judgment of a State Court may deprive a person of his property without due process of law, see, particularly

Chicago B. & Q. R. R. Co. v. *Chicago, supra,* at p. 235;
Scott v. *McNeal,* 154 U. S., 34.

This court decides for itself whether the act sanctioned by the State Court is due process of law.

Grannis v. *Ordean,* 234 U. S., 385, 394;
Scott v. *McNeal,* 154 U. S., 34.

The fact that no resort was had to an appropriation proceeding in order to accomplish the taking—the fact that it was sought to accomplish

the taking without even this compliance with the forms of law—does not show that the taking was not by the State and does not mitigate, but rather aggravates, the wrong.

Cuyahoga River Power Co. v. *Akron, supra.*

See, also, Point IV, *infra.*

Thus we have here a case in which property has been taken, under an assertion of power from the State and with the State's sanction and protection. And this is clearly beyond the power of the State. Many cases might be cited, but one recent decision of this court holding such action to be invalid under the due process clause will suffice.

Ettor v. *Tacoma,* 228 U. S., 148, was a suit to recover damages inflicted upon abutting property in consequence of an original street grading done by a railroad company under authority and direction of the city. At the time the grading was done there was in force a statute that required the city to make compensation for consequential damages due to such grading. While the suit was pending this statute was repealed. The state court held that the right to recover damages was a mere *remedy* and that in consequence of the repealing act the right to compensation was taken away. Upon writ of error from this court the judgment was reversed, it being here held that "the right to compensation was a vested property right" (p. 158). Some of the language of the court is so pertinent that we give it in a parallel column with a paraphrase illustrating its applicability to the case at bar:

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

The necessary effect of the Northern Ohio Power Company's alleged devotion of the property to a public use, as construed and applied by the court below, was to deprive the plaintiff in error of any remedy to enforce its fixed right to acquire the land. This was to deprive the plaintiff in error of a right which had vested before the alleged devotion, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiff's right to the land except the ascertainment of the amount of damage to the private owners. The right of the plaintiff in error was fixed by the law in force when it acquired its charter, and a right so vested cannot be defeated by subsequent legislation, or by any other exertion of State authority, whether executive or judicial.

There is, moreover, another feature. The plaintiff's property has been taken not only without the payment of any compensation, but also FOR A PRIVATE USE—which is, of course, a plain violation of all constitutional guaranties.

O'Neill v. *Leamer,* 239 U. S., 244, 249;
Union Lime Co. v. Chicago, &c. Co., 233 U. S., 211, 218;
Fallbrook Irrigation District v. *Bradley,* 164 U. S., 112;
Clark v. *Nash,* 198 U. S., 361;
Traction Co. v. *Mining Co.,* 196 U. S., 239, 247, 251, 252;

Shaver v. *Starrett,* 4 Ohio St., 494, 498;
Reeves v. *Treasurer of Wood Co.,* 8 Ohio St., 333;
Smith v. *Atlantic & Great Western R. R. Co.,* 25 Ohio St., 91;
McQuillen v. *Hatton,* 42 Ohio St., 202;
Lake Erie &c. R. R. Co. v. *Hancock Co.,* 63 Ohio St., 23.

The taking was for the use of The Northern Ohio Power Company. This is manifest from the fact that land was conveyed to it (Rec., pp. 147-151), the work of erecting the dam and power plants was done in its name (Rec., p. 78), and the cost of the work was charged to it (Rec., p. 86). Moreover, there is no statute under which the Traction Company can claim for itself the authority to develop hydro-electric power or utilize the Cuyahoga River for that purpose.

The charter of The Northern Ohio Power Company does not appear in the record, having been withheld by the defendants (Rec., p. 117). Hence there is nothing to show that that company was incorporated for any public purpose. Indeed, the record does not even disclose a valid organization of that company for there is no evidence of any subscription to any of its stock or the election of any board of directors.

Parkside Cemetery Ass'n. v. *Cleveland, Bedford* v. *Geauga Lake Tr. Co.,* 93 Ohio St., 161, 112 N. E., 596;
American Ball Bearing Co. v. *Adams,* 222 Fed. 967, per Mr. Justice CLARKE;
Kardo Co. v. *Adams,* 231 Fed., 950.

And this omission is fatal to the defendants' case, for in the absence of any showing that the company was duly organized for a legitimate public purpose there is nothing to substantiate

the claim that its use of the land was a public use.

If, however, it be assumed that the charter of The Northern Ohio Power Company expresses upon its face a valid public purpose, this will not avail to establish that its use is public in view of the evidence put into the record by the defendants themselves.

The purpose expressed in a charter of a corporation is not conclusive in determining the character of the use which such corporation proposes to make of land. The important thing, as said by this court in *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S., 252, is not what its charter says but what it does; and it is familiar law that, in determining whether or not a use is public, resort may be had, not only to the charter but, also, to evidence *aliundi* as to what the corporation really proposes to do.

Thus in the well-known case of *Matter of Niagara Falls & Whirlpool R. R. Co.,* 108 N. Y., 375, the proposed use was held to be private although the purpose as expressed in the charter was to construct and operate a railroad, which, it was conceded, was a public use; and this conclusion was reached because it appeared from the evidence that by reason of physical conditions the company could perform no service except the carrying of sightseers at Niagara Falls during a limited portion of each year.

Again, in *Matter of Split Rock Cable Road Co.,* 128 N. Y., 408, the articles of incorporation expressed a valid public purpose, viz., the construction and maintenance of tramways, and yet the proposed use was held to be private because it appeared from the evidence that the proposed road connected with no public highway and was to be *operated entirely for the benefit of another*

company, except that "the surplus of the capacity of the road" after supplying the needs of this company "was to be devoted to public use in carrying, in buckets, freight offered to it by any person, providing such freight is suitable to the buckets and the road."

To the same effect is

State v. *Railway Co.*, 40 Ohio St., 504.

So, too, in *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed., 516, (C. C. A. 9th Circuit), although the articles of incorporation set forth a purpose which the statute expressly declared to be public, the court resorted to the evidence to ascertain what the corporation really intended to do, and the use was held to be public only because the court was of the opinion that the evidence showed that the thing which the corporation proposed to do was within that declared purpose. One judge dissented because he was of the opinion that the evidence disclosed an intent to use the land for the corporation's own benefit only.

The principle of these cases has been uniformly applied in many others in which corporations really designed to promote private purposes have assumed "THE MASK OF PUBLIC CHARACTER" by expressing a public purpose in the charter.

See,

Note in 22 L. R. A. (N. S.) 77-80.

And no court in this country has been more resolute than the Supreme Court of Ohio has been in looking through the corporate form to the real object intended to be effected.

State v. *Railway Co.*, 40 Ohio St., 504;
Parkside Cemetery Ass'n v. *Cleveland, Bedford & Geauga Lake Traction Co.*, 93 Ohio St., 161; 112 N. E., 596.

See, also,

American Ball Bearing Co. v. *Adams,* 222 Fed., 967, 973, per Mr. Justice CLARKE;

Kardo Co. v. *Adams,* 231 Fed., 950.

What, then, is the real character of the use in this case, having regard, not alone to the corporate purpose of The Northern Ohio Power Company as expressed in its charter but, also, to the real purpose as disclosed by the evidence? Is that use public or private?

The evidence shows that the engineer who did the work of erecting the dam and power plants was hired by the Traction Company and was under its direction (Rec., p. 79); that the Northern Ohio Power Company never expended a dollar of its own upon the land (Rec., pp. 86, 231); that all the expenditures were advanced by the Traction Company (Rec., pp. 86, 88, 89, 231); that no consideration was paid by the Traction Company to the Power Company at the time of the conveyance of the property, to the Traction Company in February, 1914 (Rec., p. 231), except that "as a matter of bookkeeping" the items of cost entered upon the books of the Traction Company as an open account against the Power Company were charged off at the time of the conveyance (Rec., p. 231); that the auditor of the Traction Company had possession of the books of the Power Company, *i. e.* "what books they have" (Rec., p. 86), which books the Traction Company's counsel refused to produce at the trial (Rec., p. 117); and that despite his possession of the books this auditor of the Traction Company did not know anything about its issue of any stock or bonds in any way (Rec., p. 87).

The evidence further shows that *as soon as the*

dam and power plants were completed they were promptly turned over to the Traction Company.

Thus it appears that The Northern Ohio Power Company's so-called devotion of the land to a public use is nothing but "the mask of public character," assumed in order to enable the Traction Company to supply itself with a facility which it could not obtain under its own charter.

Recognizing and confessing itself to be utterly without any right, power, or authority to construct the plants even upon land which it now claims was its own property—without authority, in other words, to devote its own property to this alleged public use—the Traction Company claims to have accomplished that result *through and by means of another corporation.* And the control which the Traction Company apparently manifested over every act of the Power Company leads irresistably to the conclusion that the Power Company was nothing at all but a "dummy" for the Traction Company.

Whether the use thus disclosed is public or private is a question which this court will determine for itself. Hence the judgment under review is not conclusive on that point. But this court also pays great respect to State decisions clearly indicating the local policy.

See cases cited on p. 55, ante.

And where, as here, the local policy is clearly expressed in several well considered opinions of the highest State court rendered both before and after the judgment under review, while the judgment under review is not accompanied by any opinion and is really by an inferior State court, it is clearly the duty of this court to follow these other decisions in preference to the sporadic instance immediately before it.

Long before the judgment under review was

rendered, it had been established in Ohio that in order to make a use public it must be one which is "open to the use of the public, under reasonable regulations, as a matter of right and not merely of favor" (*Giesy* v. *Cincinnati, W. & Z. R. R. Co.*, 4 Ohio St., 308, at p. 327; *Shaver* v. *Starrett*, 4 Ohio St., 494, at p. 499); that it must be established *pursuant to a legislative determination*, direct or delegated, that the use is demanded by or conducive to the public health, convenience or welfare. (*Reeves* v. *Treasurer of Wood Co.*, 8 Ohio St., 333; *Smith* v. *Atlantic & Great Western R. R. Co.*, 25 *Ohio St.*, 91); and that where the use is sought to be established by a *corporation*, such corporation must be "a public instrumentality" (*Giesy* v. *Cincinnati, W. & Z. Co., supra*, at p. 327) and must have been granted, by a valid law, both "corporate existence, and the power to take private property for public uses." (*Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St., 21, at p. 33).

These decisions never have been overruled or questioned, save as their doctrine has been departed from in the case at bar. On the contrary, the principle involved in *Reeves* v. *Treasurer of Wood County* and *Smith* v. *Atlantic & Western R. R. Co., supra*, was applied in *Wallace* v. *Clifton Land Co.*, 92 Ohio St., 349, decided in July, 1915.*

And the principle of *Atkinson* v. *M. & C. R. R. Co., supra*, has been very recently reiterated in two cases, which, by a strange coincidence, involve another "dummy" created by the very Traction Company which appears as defendant here.

State ex rel. Atty. Gen. v. *Cleveland, B. & G. L. Tr. Co.*, decided by Court of Appeals, Second District, not reported,

*These three cases are more fully set forth on pp. 81, 82, 85-87, *infra*.

but printed in full in Appendix to this brief.

Parkside Cemetery Ass'n v. *Cleveland, B. & G. L. T. Co.*, 93 Ohio St., 161; 112 N. E., 596.

From these cases it appears that in 1906 the Traction Company procured the filing of articles of incorporation of the Cleveland, Bedford & Geauga Lake Traction Company and went through the form of effecting its corporate organization in the manner prescribed by the Ohio statutes. In 1911 this so-called Cleveland, Bedford & Geauga Lake Traction Company commenced a proceeding to appropriate property of the Parkside Cemetery Association. The Insolvency Court of Cuyahoga County sustained the proceeding, and its judgment was affirmed by the Court of Appeals, Eighth District, *the same court that rendered the judgment now under review.* Thereupon a suit in *quo warranto* was brought *in a different Court of Appeals* by the Attorney General of Ohio to obtain a judgment of ouster against the so-called Cleveland, Bedford & Geauga Lake Traction Company. In that suit the court found that the company *"is and always has been the 'dummy' of The Northern Ohio Traction and Light Company" and that its appropriation of property "was for the benefit of the Northern Ohio."* It was said further (Appendix, p.):

> "It is no answer to say that The Northern Ohio could legally have built this new line without the use of a dummy. For the question is not what The Northern Ohio could or could not do, but what the defendant did do. • • • *In appropriating land for the benefit of another company and in transferring such land to that company, the defendant has misused its corporate franchise."*

For these reasons the court "ousted the defendant from the right and privilege thereafter of appropriating private property." The judgment of ouster provided, however, that it should be without prejudice to the rights of the defendant with respect to appropriation suits already pending, and it was by virtue of this proviso that the case last above cited came before the Ohio Supreme Court. In that case the Supreme Court (reversing the identical Court of Appeals which rendered the judgment now under review) held that the "dummy" *did not even have corporate existence* and that *in no event could it use corporate powers for the purpose of acquiring property for The Northern Ohio Traction and Light Company.* We quote from the opinion:

> "In order to further sustain the issue on its part the defendant, in the insolvency court, tendered considerable evidence which tended to show that the plaintiff company was *endeavoring to acquire a right of way for the sole use and benefit of the Northern Ohio Traction & Light Company, and that the latter company had furnished considerable of the money, and, as the defendants claimed, all of the money, that the plaintiff company ever had.* On objection being made by the plaintiff company all of this testimony was rejected by the court. In defense of this ruling a number of authorities are cited by the defendants in error in support of the proposition that it is no objection that the organization of a plaintiff corporation was promoted or procured by another corporation, or its stockholders, which is especially interested in the enterprise for which the plaintiff was formed *and which could not condemn property in furtherance of such enterprise,* and that such matters cannot be set up in answer to the plaintiff's petition to condemn.

"The soundness of this proposition is not questioned. It is easy to conceive of a situation in which it would contribute to the public welfare, instead of being a detriment to it, if one corporation should lend assistance, financially and otherwise, to the carrying out of the purposes of another corporation which was *duly organized and actually proceeding with the performance of its corporate duties and the exercise of its corporate rights in the accomplishment of the purposes of its organization.* BUT IT IS A VERY DIFFERENT THING WHEN ONE CORPORATION CAUSES A 'DUMMY' CORPORATION TO BE ORGANIZED, EVEN IF ALL THE FORMS OF THE LAW SHOULD BE FULLY COMPLIED WITH, IF THE LATTER HAS NO REAL AND BONA FIDE PURPOSE OF ITS OWN AND NO INTENTION TO ATTEMPT TO ACTUALLY CARRY OUT THE OBJECT OF ITS ORGANIZATION AS SET OUT IN ITS ARTICLES OF INCORPORATION. It is provided in Section 8759, General Code, that:

> 'A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad.'

"If, as claimed, the plaintiff had no money or resources of its own and no real expectation of any, but was being used solely by another, it is hard to imagine the necessity of land for its railroad. In construing this language in the original statute from which it is taken, this court, in *Platt* v. *Pennsylvania R.*, 43 Ohio St., 228, 239; 1 N. E., 420, 426, approves of the following from the Supreme Court of Indiana:

> *'A railroad company has no authority to appropriate land for the use of another company,' and 'there is no authority of law*

for several railroad companies to agree that one of their number shall proceed to appropriate land for the purpose of afterward dividing it for the benefit of all; each company must proceed for itself.'

"The defendant should have been permitted to prove, if it could have done so, and should have been permitted to offer testimony tending to prove, that the plaintiff company was not proceeding in the case to appropriate land for 'its railroad,' but *was proceeding to do so for another company.* The rejection of the testimony tendered was a denial of a substantial right. The plaintiff was entitled to maintain the proceeding only when it appeared that it was the real party in interest. Section 11241, General Code."

The similarity between the case just cited and the case at bar is exceedingly striking. There the Traction Company attempted to create another corporation in order to exercise powers which it either could not or did not desire to exercise for itself, and sought to use its "dummy" in order to appropriate property to a public use. The identical scheme has been attempted in this case. The Northern Ohio Power Company, as appears from this record, never did any business and never had any "real and *bona fide* purpose of its own and no intention to attempt to actually carry out the object of its organization as set out in its articles of incorporation," and, in fact, never had any purpose whatever, *except to be used as a device by which the Traction Company might erect dams and power houses for its own use.* The record, furthermore, affirmatively shows that the land was conveyed to The Northern Ohio Power Company at the commencement of the work of erecting these

structures *and was immediately taken away from it as soon as the structures were completed.* To say that it devoted land to a public use is nothing short of an absurdity. *At the very moment at which the time for public service arrived, it was promptly divested of every asset and franchise it possessed* (Rec., pp. 95, 99, 151, showing that the hydro-electric plant was completed about December, 1913 or January, 1914, and was conveyed to the Traction Company in February, 1914). Whether the Traction Company could have erected these structures and used the land in question for the generation of power "without the use of a dummy" (as said in the *quo warranto* proceeding above mentioned) is wholly immaterial. *The fact is that it attempted to do it by means of a dummy;* and according to the law of Ohio, as settled in the *quo warranto case,* the attempt of The Northern Ohio Power Company to exercise its franchises *for the use and benefit of the Traction Company* is such a misuse of those franchises as justifies a judgment of ouster, if, indeed, under the ruling of the Supreme Court in the *Cemetery case,* it ever had any corporate existence or corporate franchise at all.

As in the case of the so-called "Cleveland, Bedford & Geauga Lake Traction Company" the Ohio courts affirmatively decided that by reason of its connection with and dependence upon the Traction Company it could not appropriate property or even exist as a corporation, so here it must be held that although the ostensible purpose of the so-called Northern Ohio Power Company as expressed in its charter may have been public, its use of the land here in question was not for the performance of that public service and is essentially private.

It must be observed, too, that the fact that the

question as to the existence and powers of The Northern Ohio Power Company does not here arise in a *quo warranto* proceeding or in a case in which the Power Company is seeking to appropriate property by means of a formal condemnation proceeding, in no wise affects the applicability of the cases cited to the case at bar; nor can there be any question of the right of the plaintiff to challenge the validity of its attempted exercise of its corporate franchises. For the settled rule in Ohio is that

> "Whenever an incorporated company, in any action, asserts a right against another person based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power."
>
> *Zanesville* v. *Gas Light Co.*, 47 Ohio St., 1;
>
> *Parkside Cemetery Association* v. *Cleveland, B. & G. L. T. Co., supra.*

The same rule was expressed in *Milville Gas Light Co.* v. *Vineland Light & Power Co.*, 72 N. J. Eq., 305, where it was laid down as a general rule that an attempt to exercise a franchise without legislative authority is, not only an unlawful usurpation, but, also, an invasion of the rights of anyone upon whom the franchises had been conferred.*

The assertion of the use of The Northern Ohio Power Company as a public use when it is in reality a mere "dummy" for another corporation, is clearly an invasion of the rights of the plaintiff

* This case was cited with approval by the New Jersey Court of Errors and Appeals in *Public Service Gas Co.* v. *Board of Public Utility Comrs.*, 87 N. J. Law, 581, 589. See, also, *Landes* v. *Milville Gas Light Co.*, 72 N. J. Eq., 347.

upon which the right to appropriate the property to a real public use has been conferred; and the validity of that attempt may be questioned and denied by the plaintiff.

In *American Ball Bearing Co.* v. *Adams,* 222 Fed., 967, Mr. Justice CLARKE, as District Judge, considered the question of corporate organizations in Ohio and squarely ruled that although the statute of Ohio authorize corporations, within prescribed limits, to become stockholders in other corporations, *this does not give any corporation "the power to create a corporation, and to control it"* (222 Fed., 975). In that case three private business corporations attempted to organize a fourth by causing certain individuals having no interest in the corporation to execute the necessary papers and go through the form of subscribing to stock and electing a board of directors. This attempt, it was held, was ineffectual and did not result in the creation of any corporation.

The decision of Mr. Justice CLARKE was reversed by the Circuit Court of Appeals for the Sixth Circuit in *Kardo Co.* v. *Adams,* 231 Fed., 950, the latter court holding that, *no fraud appearing,* the *representatives* of a corporation may subscribe for it to the capital stock of another corporation caused by it to be formed by them, and that, in that case, there was created at least a *de facto* corporation, the existence of which could not be called in question *by anyone who had done the corporation a wrong.* The court recognized, however, that although one corporation might thus, in effect, create another corporation, *the corporation so created would not have any power of eminent domain.*

It is thus settled by controlling decisions that although The Northern Ohio Power Company's

charter expressed a public purpose upon its face, and though its use would have been public if it had been validly organized in good faith for the purpose of accomplishing that purpose, yet, inasmuch as it was a mere "dummy" whose only service was to act as a catspaw for another corporation, its real purpose is not public, but private, and its taking of the plaintiff's property is a taking for a private use.

The scheme adopted by the Traction Company of creating a corporation having the charter power to utilize a river for the development of power, conveying the land to it, and having that company build the dam and power plants, may have been the product of a mistaken notion of the law. But the *Cemetery Case, supra,* announced no new principle; it had been anticipated by Mr. Justice CLARKE in the *Adams case, supra;* and, as the opinion clearly shows, it but followed and applied the doctrine of earlier decisions.

This court, therefore, may not relieve the Traction Company from the effects of its own violation of the law by attributing to it an intent not to violate it. The evidence fully establishes its intent to act through and by means of its "dummy," The Northern Ohio Power Company, and that is what it has done. It will therefore, avail nothing to urge that the Traction Company itself might have devoted the land to a public use (a contention which we submit is wholly untenable but which it is unnecessary to discuss upon this record). The case must be determined not by what might have been done, but by what was done. And so determined, it must be held that the taking of the plaintiff's property is not for a public use.

POINT IV.

The plaintiff has been deprived of its property without due process of law, in that its property has been taken without notice, not in the course of legal proceedings established by law for cases of a like nature, and by a "dummy" corporation having no legal authority to take it.

The Constitution and statutes of Ohio provide a regular proceeding in the courts of the State wherever private property is sought to be taken for a public use (*Ohio Constitution*, Art. I, § 19; *Ohio General Code*, §§ 11038-11091).

Among the requisites are that the corporation seeking the appropriation must file a verified petition containing a specific description "of each parcel of property, interest, or right, within the county, sought to be appropriated" (*Code*, § 11042). A summons upon the petition must be issued and served (*Id.*, § 11044), and upon the return of the summons the probate judge must determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree as to the compensation to be paid, and the necessity for the appropriation (*Id.*, §§11039 and 11046). Upon all these questions the burden of proof is upon the corporation seeking the appropriation (*Id.*, § 11046). The owner of each parcel is entitled to a separate trial (*Id.*, § 11048) and the compensation must be assessed by a jury (Constitution, Art. I, § 19; Code, § 11047 *et seq.*).

None of these requisites has been complied with in the taking of the plaintiff's property. The taking has been accomplished without any pro-

ceeding against or notice to the plaintiff, and, most important of all, *the taking has been accomplished by an alleged corporation which has not proved its corporate existence, its right to make the appropriation, or the necessity for the appropriation.*

Due process of law means at least "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private right"; and "to give such proceedings any validity, there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject matter of the suit."

> *Scott* v. *McNeal*, 154 U. S., 34, 46;
> *Pennoyer* v. *Neff*, 95 U. S., 714, 733.

And a fundamental requisite is the opportunity to be heard.

> *Granniss* v. *Ordean*, 234 U. S., 385, 394, and cases there cited.

Upon this ground alone, therefore, the plaintiff has been denied due process of law; for the course of legal proceedings prescribed by the Constitution and statutes has not been had in this case and the plaintiff has been thereby deprived of an opportunity to be heard upon the questions as to the corporate existence of The Northern Ohio Power Company and its right to make the appropriation.

It may be said that it had the right to introduce rebutting evidence on that subject upon the hearing of this proceeding; but this is a very different opportunity from that which it would have been accorded in an affirmative pro-

ceeding brought by The Northern Ohio Power Company against it. In such a proceeding the issue would have been known in advance, instead of coming as a surprise in the midst of a trial, and by express provision of the statute the burden of proof upon those questions would have been upon The Northern Ohio Power Company instead of upon the plaintiff (*Code*, § 11046, *supra*). The opportunity to meet a known issue with the burden of proof upon the other side is manifestly different from the opportunity to disprove an issue suddenly arising in a case in which the issue has not been presented by any pleading or statute.

It may be said, also, that the State court, by the judgment under review, inferentially has upheld the sufficiency of the process by which the plaintiff's property has been taken in this case. But that is not controlling here (*Granniss* v. *Ordean*, 234 U. S., 385, 394; *Scott* v. *McNeal*, 154 U. S., 34, 45). And we submit with confidence that this court will not sustain as due process of law a taking of property which is accomplished without any compliance whatever with the mandatory provisions of the statutes of the State, especially where, by reason of such non-compliance, the opportunity to be heard upon the question of the right to take is, in effect, denied.

There is, moreover, still another respect in which due process of law has been denied in this case.

In *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390, 400, this court adverted to the necessity for due process of law in the taking of property for a public use and then added, by way of definition of the phrase "due process" in that connection:

> "that is, *a law authorizing it* and provisions made for compensation."

The same thought was expressed in *Lamb & McKee* v. *Lane*, 4 Ohio St., 167 (quoted *infra*, p. 89, 90), and in *Atkinson* v. *M. & C. R. R. Co.*, 15 Ohio St., 21, where it was said to be requisite that the corporation have conferred upon it by a valid law "both corporate existence and the power to take private property for public use." And this, indeed, is but the statement of a familiar fundamental principle.

Lewis, Eminent Domain, Sec. 367;
California v. *Pacific Ry. Co.*, 127 U. S., 1, 40;
Cemetery Case, supra, at p. 164 of 93 Ohio St.

In the case at bar, the proof affirmatively shows that the alleged corporation, by means of which the taking of the plaintiff's property was effected, is but a "dummy"; and in view of the decision of the Ohio Supreme Court in the *Parkside Cemetery case, supra*, it is settled that it has no right to appropriate property and cannot even exist as a corporation.

Thus we have here a case in which property has been taken for an alleged public use but without the authority of the legislature. The essential requisite of "a law authorizing it" is completely lacking.

POINT V.

The defendants' alleged devotion of the land to a public use, as given effect by the State court, is a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract.

It is apparent that the whole object of the Traction Company's appearance and defense in this

case was to establish its right to hold the land as against the plaintiff; and it was through The Northern Ohio Power Company's alleged devotion of the land to a public use that it sought to accomplish this purpose. The judgment of the State court gives effect to the Traction Company's claim—it sanctions and legalizes the alleged devotion and makes complete and permanent the protection which it was the object of the defense to obtain. Thus, it was the aim of the defense and it is the effect of the judgment to give vitality and operation to an act (*i. e.*, the asserted devotion of the land to a public use) which obviously and patiently impairs the obligation of the plaintiff's contract if, as shown in Point II, a contract really exist. It must follow, therefore, that this court has the power and the duty to enforce the constitutional guarantee embodied in the contract clause if the act to which the State court has thus given effect be, in truth, *a subsequent exertion of legislative power.*

> *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S., 164, 170, 171, of which the foregoing is a paraphrase.

Although the contract clause of the Federal Constitution be a restraint upon *legislative* power only,

> *Ross* v. *Oregon,* 227 U. S., 150, 161, 162;
> *Cleveland & Pittsburg R. R. Co.* v. *Cleveland,* 235 U. S., 50, 53;

it is well settled:

(1) that any act, from whatever source arising, to which the State gives the force of law, is a law within the meaning of that clause;

> *Reinman* v. *Little Rock,* 237 U. S., 171, 176;

Atlantic Coast Line v. *Goldsboro*, 232 U. S., 548, 555.

(2) that the clause reaches "*every form in which the legislative power of the State is exerted*, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a *regulation or order of some other instrumentality of the state exercising delegated legislative authority;*"

Ross v. *Oregon, supra*, p. 163.

(3) that the clause extends to any "subsequent exertion of the legislative power of the State";

Cross Lake Club v. *Louisiana*, 224 U. S., 632, 638.

(4) that it was intended to prohibit "every mode or device" having the purpose of impairing the obligation of contracts, that its "prohibition is universal" and is directed against the "exertions of sovereignty which the citizens, unless protected by the organic law, would be impotent to resist, *whether boldly declared in an explicit law or disguised in an ambiguous form*";

Carondelet Canal Co. v. *Louisiana*, 233 U. S., 362, 378.

(5) that where an act is done *under an assertion of power from the State, or under color of authority of State laws*, which could be done only upon the predicate that there was such power, and which if done would result in violating the Constitution, such act is the act of the State even though the consummation of the wrong be not

within the powers possessed, and, indeed, may be actually forbidden by the State Constitution.

> *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S., 278, 287, 288, 295, 296;
> *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462.

Hence, even though, in the case at bar, the invasion of the plaintiff's rights should be held not to arise from any subsequent act of the legislature in the narrow and formal sense of a new enactment placed upon the statute book, and although the act constituting the invasion be "wrongful from the point of view of the State Constitution and statute" (227 U. S., at p. 292),* yet, inasmuch as the State Court has sustained and given effect to the act, and inasmuch as the act is legislative in character, that act has "by virtue of State authority, the force of State law" (235 U. S., at p. 171).

That the State Court has given effect to the act and that it operates to impair the contract, abundantly appears from what has been said: that the act is *legislative in character* may deserve a further word.

If the Traction Company and The Northern Ohio Power Company had acquired their title to the land by condemnation rather than by contract, the true character of the alleged devotion of it to

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* See, also, *United States* v. *Reynolds*, 235 U. S., 133, 148, 149; *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S., 151, 160; and *Myles Salt Co.* v. *Iberia Drainage District*, 239 U. S., 478, 484, as settling the principle that the validity of State statutes must be judged by their operation and effect upon rights secured by the Federal Constitution, and although such statutes be fair and legal on their face, yet if so administered as to have the effect of denying such rights, they must fail; or, in other words, although "the law of the State as written" be not subject to attack, "the law as administered and justified by the Supreme Court of the State" may be violative of the Federal Constitution. And to the same effect is *Detroit United Ry.* v. *Michigan*, 242 U. S., 238, 247.

a public use as *an exertion of the legislative power of eminent domain* would have been clearly apparent. The circumstance that it happened to be unnecessary for them to resort to an adversary proceeding against a hostile owner in order to acquire title to the soil does not change the character of their act, and though it may have obscured, it cannot obliterate, the fact that their act is, inherently and essentially, an exercise of that legislative power.

If the land, in the condition it stood at the time the plaintiff's contract was obtained, were subject to the plaintiff's right to acquire it—if the plaintiff then possessed the right to acquire it—then any act which defeats or even substantially interferes with that right is a "taking" of the plaintiff's property.

Callen v. *Electric Light Co.*, 66 Ohio St., 166, 177;
Mansfield v. *Balliett*, 65 Ohio St., 451, 464, 476;
Pumpelly v. Green Bay Co., 13 Wall., 166, 177;
Lewis, Eminent Domain, §§ 63, 64, 65.

And as the alleged devotion, as given effect by the State Court, does defeat the plaintiff's right, and as the taking is for an alleged public use, the character of the act as an exercise of the legislative power of eminent domain is manifest.

It is, indeed, one of the anomalies of this case that a proceeding instituted by the plaintiff for the appropriation of property has resulted in its own property being appropriated; for it is important to bear in mind that although the Traction Company appeared as a defendant and, in form, interposed a mere defense to the plaintiff's proceeding, it in fact, has been awarded *affirma-*

tive relief in that it has been accorded, through The Northern Ohio Power Company, the right to appropriate the plaintiff's property to its own use. That is to say, if the plaintiff's right to acquire the land be a property right to which the land was subject or subservient, no one could obtain a full title to the land or a right to use it for any purpose inconsistent with the plaintiff's use without acquiring this right of the plaintiff and paying just compensation therefor; and as the judgment under review in effect gives to the Traction Company such a full title and right of exclusive use, free of any claim of the plaintiff, the judgment obviously has all the effect of a judgment in an appropriation proceeding brought against the plaintiff. In short, in this proceeding the power of eminent domain has been exercised *against* the plaintiff.

Apart from this feature, however, it is a fundamental principle that *the devotion of property to a public use is a governmental function, a prerogative of sovereignty, and can be accomplished only by the State or "some instrumentality of the State exercising delegated legislative authority"* (227 U. S., 163). It is, in short, an exercise of the legislative power of eminent domain *even though the corporation making the devotion be able to acquire the title of the private owner by contract or agreement without the necessity of a formal appropriation proceeding.*

This has been squarely ruled by the Supreme Court of Ohio in two cases in which the devotion to railroad uses of lands *purchased* by railroad companies was held to be an exercise of the power of eminent domain.

Doan v. *Cleveland Short Line Ry. Co.*,
92 Ohio St., 461, 112 N. E., 505;

Ward v. *Cleveland Ry. Co.*, 92 Ohio St., 471; 112 N. E., 507.

In each of these cases the plaintiffs were owners of certain lots which had been laid out upon a uniform plan and sold with the restriction that they should be used exclusively for residence purposes. The defendants had *purchased* some of the lots with knowledge of these restrictions, but, in disregard thereof, were proceeding to use them for railroad purposes. The *Doan case* was an action at law for damages, the claim being that the Railroad Company's use of its lots for railroad purposes was a taking of the plaintiff's property without compensation. The *Ward case* was a suit in equity to enjoin the defendant from using its lots for railroad purposes in violation of the covenants contained in the deeds. In each case the plaintiffs were denied relief. In the opinion in the *Doan case* the court stated that such covenants were recognized and given full force and effect between private owners of lots and that such private owners could be enjoined from using the lots for other purposes. But it then said:

> "The case at bar, however, is one at law, in which plaintiff seeks to recover compensation by way of damages resulting from the taking of an alleged property right which she claims to have had in the lots of the defendant, a railroad company organized under the laws of the State and *possessing the right of eminent domain.* It is *the owner of a number of lots* in the allotment and at the time of the commencement of this action was building a railroad on and over *its property.* IT WAS DEVOTING THESE LOTS TO A PUBLIC USE. If plaintiff is entitled to compensation by way of damages by reason of the use of this property by the railroad company, a right

must grow out of the covenant in the deeds of the allotter and the general plan adopted which restrict the use of the property to residence purposes. If such restriction is not to be construed as preventing the use of the property for public purposes, then, of course, there is no violation on the part of the defendant, and it follows that no recovery can be had. If, on the other hand, it is to be construed as prohibiting the use of the property for any purpose other than that of residences, it would prevent a public use of the lots *and thereby defeat the* RIGHT OF EMINENT DOMAIN. No covenant in a deed restricting the real estate conveyed to certain uses and preventing other uses can operate to *prevent the State, or any body, politic or corporate, having the authority to exercise the right of eminent domain from devoting such property to a public use.* The right of eminent domain rests upon public necessity, and a contract or covenant or plan of allotment which attempts to prevent the exercise of that right is clearly against public policy and is therefore illegal and void.

* * * * * * *

"We are constrained to the conclusion that restrictive covenants in deeds or a general plan for the improvement of an allotment cannot be construed to *prevent the use of the lots for public purposes, and as against the State or any of its agencies which are vested with the right of eminent domain are illegal and void, confer no property right and cannot be the basis of a claim for damages.*"

And in the *Ward case* it was said:

"It appears from the amended petition that the defendant in error is a street railway company, organized under the laws of the State of Ohio, owning and operating a sys-

tem of street railways in the City of Cleveland and its adjacent and contiguous suburbs, and *vested with the right of eminent domain.* It is *the owner by purchase* of six lots in the allotment in question, and plaintiffs are asking that the company be enjoined from using the property for railway purposes. The covenants in the different deeds restricting the use of the lots in the allotment to residence purposes are *not binding upon a corporation possessing the right of eminent domain. Doan* v. *Cleveland Short Line Ry. Co., ante,* 461. The demurrer to the petition was properly sustained, and the judgment of the Court of Appeals is therefore affirmed."

The principle of the cases just cited as proceeding upon the theory that the act of devoting one's own property to a public use is an exercise of the power of eminent domain is pointedly emphasized by another decision of the Ohio Supreme Court rendered the same day.

Wallace v. *Clifton Land Co.,* 92 Ohio St., 349, 110 N. E., 940.

In that case lot owners who had purchased lots according to a general plan whereby uniform restrictions were imposed limiting the use of the land to residence purposes sought to enjoin *a real estate company* from devoting some of the lots which it had acquired under the same restrictions to road and street purposes. It was argued for the Land Company that its use of the lots for road and street purposes was a devotion to a public use and "that the public has the right to take private property for public use whenever it becomes necessary, and that no contract can be made that will prevent the state or any body politic or corporate, *having the right of eminent domain,* from appropriating private property to a public use." The

court stated that that was a "self-evident proposition" but "it is not the case presented for review." It then said:

> "These *private proprietors* have undertaken to create a public thoroughfare through this addition and over the lands subject to these restrictions. *Public ways cannot be established in this manner.* The need of such thoroughfares is *a question to be determined by the public authorities.* When these authorities have determined the necessities of such ways, private property can be taken for such use, regardless of restrictions or limitations placed upon the same by deed, contract or otherwise, and when established, these ways come under the control of the public authorities, whose duty it is to keep them in repair, free from nuisance and open for public travel. The question whether the owners of other lots in this addition have any property interest in these lots that would require them to be compensated before being taken for public use does not arise in this case.
>
> "It is said in argument that these lots have already been deeded to the City of Lakewood for street purposes, but *no presumption obtains that the city will accept such grant,* for this carries with it burdens of construction, maintenance, care and control that the city authorities may not care to assume.
>
> "The only question presented in this record is the question of the right of The Clifton Land Company to devote these lots, covered by these restrictions, to street purposes, and that question must be answered in the negative."

Thus in these three cases the highest court of the State has determined (1) that a devotion of property to a public use cannot be accomplished

by the act of the owner alone unless he have the power of eminent domain—some public authority must determine the need for the use and accept the devotion; (2) where an owner having the power of eminent domain devotes his property to a public use such devotion is an exercise of that power.

The same principle has been likewise applied in this court.

In *California* v. *Pacific Ry. Co.*, 127 U. S., 1, 40, this court said:

> "Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, *which ought not to be exercised by private individuals at their mere will and pleasure,* but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. *Under our system, their existence and disposal are under the control of the* LEGISLATIVE *department of the government, and they cannot be assumed or exercised without* LEGISLATIVE *authority.* NO PRIVATE PERSON CAN ESTABLISH A PUBLIC HIGHWAY, OR A PUBLIC FERRY, OR RAILROAD, OR CHARGE TOLLS FOR THE USE OF THE SAME, WITHOUT AUTHORITY FROM THE LEGISLATURE, DIRECT OR DERIVED. THESE ARE FRANCHISES. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is

a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

And this must be so, else it is within the power of any and every private citizen to determine for himself when the public welfare requires the employment of property in a certain public use, what property shall be devoted to that use, when and how the devotion shall be made, the length of time it shall continue, the amount of property necessary to be employed, and, in fact, all the questions that are determined by the legislature or its agent in the ordinary and usual exercise of the power of eminent domain. And this, too, despite the fact that the State itself has said the property shall be devoted to some other use.

The case at bar is an illustration: The State has determined that the Cuyahoga River shall be devoted to the public use of developing and furnishing light, heat and power to the general public and has created the plaintiff as its agent for the accomplishment of this purpose. The defendants assume to say that the accomplishment of this purpose shall be prevented in order that they may utilize a small fraction of the river for their own purposes. They have assumed to determine that the public welfare demands that the land in controversy be utilized for their power house, that the land is necessary for their use, and that by reason of their own determination of these questions the land cannot be devoted to the plaintiff's use.

Their act, in short, involves a determination of every question that is assumed to be in the mind of the legislature when it determines upon an exercise of the power of eminent domain.

It is for the legislature to say if, when, and by whom, a particular parcel of land within its jurisdiction shall be devoted to a specified public use. It may say this either directly or through its duly authorized agent. But certainly no individual or corporation can determine these questions unless the authority therefor has been delegated to it by the legislature.

Wallace v. *Clifton Land Co., supra;*
Reeves v. *Treasurer of Wood County,* 8 Ohio St., 333.

In the case last cited an act of the Legislature giving township trustees the power to appropriate property for opening ditches was held unconstitutional as authorizing a taking of property for a private use because the power of the trustees was general and not confined to opening ditches when they "found the same to be demanded by, or conducive to, the public health, convenience or welfare." The court stated that they saw nothing objectionable in the fact that the trustees were given power to act upon the application of a single party, nor in the fact that they might locate the proposed ditch upon lands held by two owners only, but it then said:

> "But it is a much more serious subject of inquiry, whether this section does not, in effect, authorize the entry upon lands and the construction of drains, when demanded by private interest merely, without reference to the public interest, convenience, or welfare. It seems to us clear that it does. If the trustees had been authorized to locate and provide for the opening of a ditch only in case they found the same to be demanded by, or conducive to, the public health, convenience, or welfare, then their action, under legisla-

> tive authority, would be but an ordinary and legitimate exercise of the right of eminent domain. *But this statute prescribes no such condition*—no such rule of official duty or limit to official discretion; and a ditch may be located and opened upon the lands of individual proprietors solely for purposes of private interest irrespective of the public welfare, without infringing any provision of this act, either express or implied."

A similar ruling was made in *Smith* v. *Atlantic & Great Western R. R. Co.,* 25 Ohio St., 91, in which the court held invalid an act of the legislature that authorized a probate judge of any county to cause levees or embankments to be established or constructed along any stream or watercourse in his county "whenever in his opinion the same will be conducive to the health, convenience or welfare of any number of citizens of the county or is necessary for the protection of the lands of said citizens, or any of them, from overflow." In that case the court said (p. 101):

> "The public welfare is not within the purview of the act, either in express terms or by implication. The action of the probate judge is not limited by the act to cases only in which the location and construction of levees are demanded by the public welfare, 'but under it, and without infringing any of its provisions, a levee might be located and constructed upon the lands of individual owners, for purposes of private interest merely.' "

These decisions make it plain that in order to make a particular use or purpose public rather than private, there must be *a determination that such use or purpose is demanded by, or conducive to, the health, convenience or welfare of the public;* that the power to make that determina-

tion is lodged *in the legislation;* and that no one else may assume to make it unless the authority therefor has been delegated to him by the legislature.

It is also settled by many other decisions in Ohio that although land be actually employed in a use which is public in its nature, it may yet be taken under a general power of eminent domain unless the employment of the property in that use is *pursuant to the power of eminent domain,* or, at least, *for a purpose for which the corporation employing the property was authorized by the legislature to exercise that power.*

Iron R. R. Co. v. *City of Ironton,* 19 Ohio St., 299;

Northern Ohio Ry. Co. v. *Comm'r's of Hancock Co.,* 63 Ohio St., 32;

Railroad Co. v. *Belle Centre,* 48 Ohio St., 273;

Little Miami &c. R. R. Co. v. *Dayton,* 23 Ohio St., 510;

Hatch v. *Cincinnati & Indiana R. R. Co.,* 18 Ohio St., 92, 119.*

AND THAT IS BUT ANOTHER WAY OF SAYING THAT THE DEVOTION OF PROPERTY TO A PUBLIC USE IS A LEGISLATIVE ACT. That is to say, the mere employment of property in a public use does not constitute a devotion of the property to that use in the sense that the property is thereby withdrawn from the reach of a general power of eminent domain; and the obvious reason for the rule, the principle upon which it rests, is that no citizen can of his own motion determine the use to which property shall be put as against the right of one possessing the power of eminent domain to appropriate it for another use. That is the function of the State.

*See quotations from these cases pp. 103-107, *infra.*

This, of course, is in no respect a limitation upon the right of an owner of property to employ it in any lawful use or for any lawful purpose. It only means that he cannot, by employing it in a use of a public nature, in any way impair a right already existing in another to take the land under the power of eminent domain.

Neither do we deny that an owner of property, even though not invested with the power of eminent domain, may so use his property as to cause it to be affected with a public interest and thereby render it liable to regulation by the public authorities.

> *Munn* v. *Illinois*, 94 U. S., 113;
> *German Alliance Ins. Co.* v. *Kansas*, 233 U. S., 389;
> *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S., 252.

That principle is not in conflict with the proposition we have stated. Indeed, the cases cited sustain our position. In each of those cases the legislature declared certain businesses or certain uses of property to be *public*, and the act of the legislature was sustained as against the contention of the owners that the business or use in question was *private*. There was no claim in any of those cases that by the owner's act in making a certain use of his property he had withdrawn it from the power of the State or its authorized agent to take it for such use as the State saw fit. Would anyone contend, for example, that because the business of insurance has been held to be affected with such a public interest as to justify the regulation of rates, property used in that business is withdrawn from a general power of eminent domain merely because of the fact that it is employed in that business? Could an insurance

company, by erecting an office building in the path of a projected railroad, defeat the railroad company's appropriation of the land by the plea that its property was devoted to a public use? Here we have an illustration of the distinction between the mere employment of property in a use of a public nature and a devotion of the property to a public use in the sense of withdrawing the property from a general power of eminent domain. And the distinction lies in the fact that whereas the mere employment of property in a use of a public nature may be accomplished at the mere whim and caprice of the owner, the devotion of property to a public use in the sense of withdrawing it from a general power of eminent domain can be accomplished only by an exertion of State power, *i. e.,* the power of eminent domain; and as that power is legislative in nature, it follows that a devotion of property to a public use in the sense stated is "an exertion of legislative power."

In *Cincinnati* v. *Louisville & Nash. R. R. Co.,* 223 U. S., 390, this court said (p. 400):

> "But the right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to state governments, without which they could not well perform their great functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, *a law authorizing it,* and provisions made for compensation."

And in *Lamb & McKee* v. *Lane,* 4 Ohio St., 167, the Supreme Court of Ohio, quoting from an earlier case, said (p. 175):

> "Before the owner can, without his consent, be deprived of his land, for the public use, *the legislature must declare by law that the public welfare requires* it, direct the mode of ascertaining its value, and provide for its payment."

Under these authorities it is very clear that if the plaintiff's right to acquire the land be a property or contract right, it could not be deprived of that right by any merely private or individual act of the defendants.

In other words, *the plaintiff's right to acquire the land can be defeated only by an act of the legislature*, and if, as the State court here has held, the defendants' asserted devotion of the land in question to a public use has the effect to defeat that right, such devotion must be, in substance and effect, an act of the legislature—a law of the State within the meaning of the contract clause of the Federal Constitution.

The conclusion that the devotion of land to a public use in such manner as to defeat a prior existing right to acquire the land is a *legislative act* within the meaning of the contract clause may be further demonstrated by approaching the subject from a somewhat different angle.

If the Ohio Legislature had passed an act specifically setting apart the land in question for a particular public use, no one would dispute that such act was a law of the State. So, too, if a municipality, acting under delegated authority from the State, should pass an ordinance of the same character, it would be beyond question that such ordinance was a law of the State. It was expressly so held in *Cuyahoga River Power Co.* v. *Akron*, 240 U. S., 462, which involved an ordinance of that kind.

Now can any distinction be drawn between an act of the legislature or a municipal ordinance which specifically sets apart particular property to a particular public use and a similar setting apart of particular property to a particular public use by *any corporation upon which the legislature has conferred the power to do so?* A negative answer is impelled because the nature of the act in each instance is the same, and the fact that such corporation is exercising delegated authority gives its acts the same force as if made by the legislature.

Can, then, a distinction be drawn on the ground that when the devotion of property to a particular public use is made by the legislature or by a municipality the devotion is expressed in a *written* act, while a similar devotion by a corporation is or may be expressed by mere *physical* acts? A negative answer is again impelled because to so hold would, in the words of Chief Justice WHITE in *Barlow* v. *Northern Pacific Ry.*, 240 U. S., 484, 487, "dominate the substance of things by the mere shadow." And in that very case it was held that an appropriation of a right of way under the Right of Way Act of March 3, 1875, might be made by the physical act of actual entry upon the land quite as effectively as by the filing of the map required by that statute.

Suppose that in the *Akron case, supra*, the city's authority had been vested in its Director of Public Service instead of in the City Council. Would that fact make the act of the Director of Public Service in setting apart the property for water supply purposes any less a law of the State than the ordinance was? And if there were no requirement that the Director of Public Service make his orders in writing, would not his verbal

direction to the City's engineers to go upon the river and erect a dam be just as much a law of the State as the ordinance?

In *Grand Trunk Ry.* v. *Indiana R. R. Commission,* 221 U. S., 400, 403, an order of a Railroad Commission directing the installation of an interlocking plant at the crossing of two railroads was held to be a law of the State within the meaning of the contract clause. Would the same order have been any less a law of the State if it had been verbal instead of written, or if the Commission itself had installed the interlocking plant instead of directing the railroad company to do it, provided the State court gave effect to it? Clearly not. The reason it was held to be a law of the State was that it was legislative in character and, by virtue of State authority, had the force of an act of the Legislature itself. And these are the only requisites necessary to make any act, whether written or physical, a law of the State, within the meaning of the contract clause.

In short, in order for an *act* to be a *law* it is not necessary that it prescribe a rule of action which affects the conduct of every citizen of the State in the same manner and to the same degree. It is sufficient if the act is held by the State court to have the force of State authority and "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." (*Prentis* v. *Atlantic Coast Line,* 211 U. S., 210, 226; *Ross* v. *Oregon,* 227 U. S., 150, 163). And when the act of devoting property to a public use is held by the State court to change existing conditions and to constitute a new *status* which must be recognized by other persons in their proceedings against the land, such act comes within this definition of *legislative acts* and is a law of the State

for the same reasons and with the same effect as the order involved in *Grand Trunk* v. *Indiana R. R. Commission, supra,* was held to be a law of the State.

In addition to all this, the Supreme Court of Ohio holds that *judicial decisions* that impair the obligation of contracts come within the contract clause of the Federal Constitution.

Thomas v. *State,* 76 Ohio St., 341, 361.

And, under the settled rule that whatever the State court regards as a law of the State will be treated as such by this court, it follows that *even though the plaintiff's contract in this case were impaired solely by reason of the decision below, such impairment would be a violation of the Constitution.*

It only remains now to show that:

The alleged devotion relied upon by the defendants is subsequent in time.

The plaintiff's articles of incorporation were filed on May 29, 1908 (Rec., p.). It completed its organization and adopted its resolution declaring the necessity for the land in question on June 4, 1908 (Rec., pp. 35, 36).

At that time the land was vacant and unimproved and actually employed in no use and for no purpose whatsoever except that a portion of a small inexpensive wooden structure, intended and occassionally used for dancing and roller skating, was situated within its boundaries (Rec., pp. 71, 76).

SUBSEQUENT THERETO there was erected upon the land a dam and other appliances for a hydro-electric plant, which plant has a capacity of 2750 horse-power during a period of about seven or eight months during each year, and is incapable

of operation during the remainder of each year (Rec., pp. 77, 93, 94). Adjacent to this hydro-electric plant there was also erected a steam power plant having a normal capacity of 31,000 horse power and a maximum capacity of about 83,000 horse power (Rec., pp. 77, 90, 94). The main buildings constituting the steam power plant are located *outside* of the land in controversy, but a portion of the foundations extend within its limits (Rec., pp. 80-82, and Deft.'s Ex. J, opposite p. 305). The steam power plant is also connected with the river by means of pipes that are laid under ground from the power house across the land in controversy to the river, and through these pipes the water of the river is pumped to the boilers of the steam power plant for use in the generation of steam (Rec., pp. 90, 91, 92, 94, 96, 97).

The work of clearing the ground for the steam power plant was commenced in December, 1910 (Rec., pp. 78, 79, 83, 90). The plant was completed and commenced operation about December, 1912 (Rec., p. 99, the witness testifying in March, 1914, that it was "Twelve months last December is when we started getting things in operation"). The work of constructing the dam and the other appliances of the hydro-electric plant was not commenced until after January 20, 1911, the date of the commencement of this proceeding (Rec., p. 77, where the witness testifying in March, 1914, says the dam was started "about two years ago—over two years ago"), and was not ready for operation until December, 1913, a few months before the hearing in the Court of Common Pleas (Rec., p. 99, where one witness says this plant commenced working "this December," and p. 95, where another witness says its operation was started "about the second week in January").

The defendant Traction Company claims that the land in controversy and these power plants and dam were subsequently conveyed to it by deed dated *February 24, 1914* (Rec., p. 151), and that at the time of the hearing it was using the electric current generated by these two power plants in connection with its business (Rec., p. 77). On the date of said conveyance the present proceeding was still pending in court undetermined.

THE ERECTION OF THESE POWER PLANTS AND THE USE OF THE ELECTRIC CURRENT GENERATED BY THEM CONSTITUTES THE SO-CALLED DEVOTION TO A PUBLIC USE UPON WHICH THE DEFENDANTS RELY IN ORDER TO DEFEAT THIS PROCEEDING.

AND THIS MERE RECITAL OF DATES CLEARLY SHOWS THAT THE ALLEGED DEVOTION TOOK PLACE LONG AFTER THE PLAINTIFF'S RIGHT TO ACQUIRE THE LAND HAD VESTED, AND, IN FACT, DURING THE PENDENCY OF ITS PROCEEDING TO ACQUIRE IT.

POINT VI.

In rendering its decision the State court necessarily gave effect to the Ohio Public Service Commission Act of June 30, 1911.

Whatever may have been the process of reasoning by which the State court reached its conclusion, it is plain and indisputable that the force of its decision is to abrogate the plaintiff's right to acquire the land—impair this obligation of its contract—in consequence of the legal effect upon the plaintiff's contract which the State court attributed to the various steps and proceedings of the Traction Company, the Realty Company and the Northern Ohio Power Company as disclosed

by the record, including the successive conveyances of the land and the actual use by the Traction Company of the product of the power plants erected in the name of the Northern Ohio Power Company. These various steps and proceedings, which the State court was thus called upon to consider, relate to and involve the inter-corporate relations of three different kinds of corporations operating under three different charters, the organization and control of one public utility corporation by another, and the use by one public utility corporation of the product of another and different public utility corporation. And the substantial part and actual consummation of these various steps and proceedings of these three companies took place after the Ohio Public Service Commission Act of June 30, 1911, was enacted.

That statute brought under the jurisdiction and supervision of the Public Service Commission street railroads, interurban railroads, and also electric light companies—the latter being defined so as to include any person, firm or corporation wherever organized or incorporated engaged in the business of supplying electricity for light, heat or power purposes to consumers within the state (§§ 3 and 4 of the Acts; §§ 614-2 and 614-2a of Ohio General Code); and from the time the statute became effective all persons, firms and corporations subject to the jurisdiction of the Commission could act only in accordance with the statute and the orders of the Commission made pursuant thereto. Among the matters embraced in the statute were the entire subjects of the purchasing, selling, and leasing of the property of one public utility by or to another, the issuing of stock and bonds by public utility and railroad corporations, and the purchasing and holding of the stock of one public utility by another (§§ 56, 57, 63 and

65 of the Act; §§ 614-53, 614-54, 614-60, 614-62 of Ohio General Code).

It follows, therefore, that the validity and effect of the steps and proceedings of the three companies were governed by and must have been determined with reference to the subsequent statute of June 30, 1911, which took effect long after the plaintiff's contract rights accrued; and in giving effect to the steps and proceedings so taken under this subsequent legislation, the state court necessarily gave effect to the subsequent legislation itself.

Under these circumstances, neither the process of reasoning by which the state court reached its decision, nor the precise extent to which reliance was placed upon the subsequent legislation, is material. The subsequent law was there; and the steps and proceedings taken under that subsequent law were given effect. It is therefore impossible to say that the decision of the State court turned upon the meaning, validity or effect of the plaintiff's contract under laws existing when it was made, without reference to the subsequent law.

> *Detroit United Ry.* v. *Michigan,* 242 U. S., 238, 247.

As said in that case, the force of the decision is to abrogate the rights acquired by the plaintiff under its charter, not merely because of some view the State court may have entertained with respect to the existence and extent of the plaintiff's rights under existing laws, but because of the combined effect of those existing laws and the subsequent legislation of June 30, 1911.

POINT VII.

The plaintiff has a vested right to acquire the land despite the defendants' present use of it, because

(A) Even if the use be public there is no devotion of the land to that use pursuant to a lawful exercise of the power of eminent domain, and

(B) Even if there were such a devotion to a public use the plaintiff's right, as fixed by its charter, extends to the acquisition of land already devoted to a public use.

It is, of course, beyond question that, according to the effect given by the State court to the defendants' alleged devotion to a public use, the plaintiff has no right to acquire the land. This indeed, is the basis of our claim of violation of constitutional rights.

But this effect having been given and the case being properly here, this court must consider the further contention that the plaintiff's rights, when properly construed, extend to the acquisition of the land in spite of the defendants' present possession and use of it.

It has become a truism that, in cases coming here under the contract clause, this court determines for itself, not only whether there is a contract, but, also, *the proper construction of the contract* or, in other words the extent of its obligations; and this rule applies even though the State court may have placed its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative,

or has construed it in such manner that the act complained of is not an impairment of its obligations, *i. e.*, has upheld the subsequent legislation on the ground that the contract did not confer the right claimed.

Columbia Water Power Co. v. *Columbia El. Ry. Co.*, 172 U. S., 475, 487;
Mobile & Ohio R. R. v. Tennessee, 153 U. S., 486, 492, 493;
Chicago &c. R. R. v. Nebraska, 170 U. S., 57, 68;
Louisiana Ry. & Nav. Co. v. *New Orleans*, 235 U. S., 164, 170;
Atlantic Coast Line v. *Goldsboro*, 232 U. S., 548;
Russell v. *Sebastian*, 233 U. S., 195;
N. Y. El. Lines Co. v. *Empire City Subway Co.*, 235 U. S., 179;
Northern Pac. R. Co. v. *Minnesota ex rel. Duluth*, 208 U. S., 583, 590;
Muhlker v. *New York & Harlem R. R. Co.*, 197 U. S., 544, 570;
Detroit United Railways v. *Michigan*, 242 U. S., 238.

It is settled, too, that in determining the existence and proper construction of the contract, the decision of the State court, even though involving only the construction of State statutes, is not conclusive.

Grand Trunk Western Ry. v. South Bend, 227 U. S., 544.
Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 416, 432;
Jefferson Branch Bank v. *Skelly*, 2 Black, 436;
Bridge Proprietors v. *Hoboken Company*, 1 Wall., 116;

Interborough Rapid Transit Co. v. *Sohmer,* 237 U. S., 276, 284.

And where, as here, the contract arises from a State law this court "treats it as if there was embodied in its text the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken," *later decisions to the contrary outwithstanding.*

Ennis Water Works v. *Ennis,* 233 U. S., 652, 657;

Muhlker v. *New York & Harlem R. R. Co.,* 197 U. S., 544, 570.

The principles of these cases require that (at least in cases depending upon legal construction only) this court exercise the same jurisdiction to determine for itself the existence and extent of asserted *property* rights in cases coming here under the *due process clause,* else it is within the power of the States to smother the Constitution by the device of a finding that certain rights are not property; and this jurisdiction was exercised in *Ettor* v. *Tacoma,* 228 U. S., 148, 155, 158, where a right which the State court had held was a mere remedy was held by this court to be "a vested property right."

It follows from these principles that this court must here determine for itself (*a*) whether, even though the use relied upon by the defendants be a public use, there has been such a *devotion* of the land to that use as will prevent its being taken under the plaintiff's power of eminent domain, and, if so, (*b*) whether the scope of the plaintiff's charter is such that it has a right to acquire the land despite the fact of such devotion, or, in other words, whether the plaintiff's charter gives it the right to acquire property already devoted to a public use. And in determining those

questions it must treat the plaintiff's charter *as if there was embodied in its text the settled rule of law which existed in the State at the time the plaintiff's contract was made.*

Ennis Water Works v. *Ennis, supra.*

We therefore proceed to discuss those questions as to the scope and proper construction of the plaintiff's charter with particular reference to the settled course of decision in Ohio up to the time its charter was obtained.

A.—Although the land be actually employed in a public use, it may yet be taken by the plaintiff because it has not been legally devoted to that use pursuant to the power of eminent domain.

In their arguments below the defendants relied upon the rule that property already devoted to a public use cannot be taken under a mere general power to appropriate, *i. e.*, where the power to take property already devoted to a public use is not granted either expressly or by necessary implication.*

This rule is well established; but mere employment of property in a public use does not constitute a devotion of the property to that use within the meaning of the rule. *The rule applies only where the property has been legally devoted to the use pursuant to the power of eminent domain.*

This does not mean that the mere fact that title to the land was acquired by contract, rather than by an appropriation proceeding, will prevent the application of the rule; but it does mean that the corporation invoking the protection of the rule *must have had the power to acquire the land by an appropriation proceeding,*—the use must be

* The defendants' brief stated the rule rather inaccurately. Perhaps this inaccuracy contributed to the State court's decision.

one for which it could exercise the power of eminent domain.

That this is the true meaning of the rule is recognized by many authorities and particularly the Supreme Court of Ohio.

The rule is founded, says LEWIS,

> "upon the presumption that the legislature did not intend, by a general grant of the eminent domain power, to authorize an interference with the enjoyment of property devoted to a prior use *under prior grants of the same power.*"
>
> *Lewis, Eminent Domain,* § 441.

Thus the very foundation of the rule precludes its application where the devotion has not been under the power of eminent domain.

The same author further says:

> "As to property actually devoted to a public use *by a corporation having the power of eminent domain,* there is probably no distinction between such as has been acquired by contract and such as has been acquired by condemnation."
>
> *Idem,* § 443.

He says also:

> "* * * property acquired in fee simple *by a corporation having the power of eminent domain* and not in use and not legally designated and set apart for public uses, may be taken for public use under a general power the same as though it belonged to an individual, and this though the corporation intended to make use of it for public purposes."
>
> *Idem,* § 443.

and

"*The same rule applies to property acquired by contract and* USED FOR A PURPOSE FOR WHICH THE PROPERTY COULD NOT BE CONDEMNED."

Idem, § 443.

In *Hatch* v. *Cincinnati & Indiana R. R. Co.*, 18 Ohio St., 92, 119, it was said:

"The power of one corporation, in the exercise of the delegated right of eminent domain, to appropriate, without consent, to its own uses what constitutes the material body of another corporation, *and which the latter has obtained by the exercise of a like delegated authority*, is a power so extraordinary, and so susceptible of abuse, that its existence certainly ought not to be inferred from statutory phraseology of doubtful import."

In *Iron Railroad Co.* v. *City of Ironton*, 19 Ohio St. 299, the Railroad Company sought to enjoin the city from condemning for wharf purposes certain land already in use by the Railroad Company as a wharf. It was alleged that the Company had *purchased* the land and was *the fee simple owner thereof*, that it was *using the same for a wharf upon which to receive and discharge freight and passengers*, that it was *necessary for the uses and purposes of the railroad*, that it was entitled to hold the same notwithstanding the general power given to cities to condemn property for wharf purposes, and that to permit the city to take the land would "take away from the plaintiff rights and franchises guaranteed to the plaintiff by law, and prevent the plaintiff from the full exercise of the privileges conferred upon the defendant * * * and will wholly deprive

plaintiff of the landing and wharf upon the Ohio River at the terminus of plaintiff's railroad, which landing and wharf are necessary and essential to the plaintiff in the legitimate and proper use of plaintiff's railroad."

Upon the question whether the property was subject to appropriation by the city the Supreme Court of Ohio said:

> "The plaintiff was incorporated to construct a railroad from the Ohio River, in Upper township, in Lawrence county, to the south line of Jackson county. * * * O. L. L., vol. 47, p. 160.
>
> "By its charter it was declared to be invested with all the powers, and to be subject to all the restrictions and provisions of the act regulating railway companies, passed Feb. 11, 1848. 2 Curwen, 1394; 1 S. & C. Stat., 271.
>
> "By this act the plaintiff was authorized to construct and maintain a railroad with a single or double track, with such side tracks, turn-outs, offices and depots as it seemed necessary, between the points named in its charter; and for this purpose it was authorized to enter upon any lands for the purpose of examining and surveying its railroad line, and to appropriate so much thereof as might be deemed necessary for its railroad, including necessary side-tracks, depots, work-shops, and water-stations.
>
> "So far as the power of the corporation to appropriate private property to public use aids in the solution of the question before us, the foregoing embraces all the authority with which the plaintiff is endowed; and the authority thus given is intended to furnish the necessary territory upon which to operate its road.
>
> "*We find no power given the company to*

condemn or to hold private property to its exclusive use, solely for wharf purposes, nor for streets or ordinary highways. These may be necessary for the convenient transaction of its business; but they are alike necessary facilities for the transaction of the business of the public at large.

"A wharf is a necessary incident to water transportation, and it would doubtless be for the interest of a private merchant or an unincorporated carrier, as well as of the plaintiff, to hold such property exempt from appropriation to public use; but the owner, nevertheless, when the property is required for a public wharf, is compelled to give up his right to the exclusive use, and to submit to the inconvenience of using the property as one of the public.

"We discover no more authority in the statute for the plaintiff, as against the public, to claim exclusive wharf privileges, than it has to exclusive privileges in the river as a highway. As respects such property, we think the company stands upon the same footing as other proprietors.

"The power given to the municipal authorities to condemn property for the purposes of a wharf is an express power. *The right of the company to hold property exempt from the exercise of this power, cannot, it seems to us, be extended, by construction, to lands held by the company* FOR USES AND PURPOSES FOR WHICH IT IS NOT BY LAW AUTHORIZED TO CONDEMN PRIVATE PROPERTY."

In *Little Miami &c. R. R. Co.* v. *Dayton,* 23 Ohio St., 510, 518, the court said:

"Property appropriated to a particular public use is not thereby withdrawn from the liability to be taken for a different and inconsistent use, whenever, in the judgment of the

> legislature, the public exigency may require. The power of eminent domain is a prerogative of sovereignty. It is not exhausted by use, and can only be limited by the public exigency upon which it is founded. *Giesy* v. *Railroad Co.*, 4 Ohio St., 324. But where land is appropriated, PURSUANT TO LEGISLATIVE AUTHORITY, to an important public use, a subsequent grant can not be held to authorize the same land to be taken for a use wholly inconsistent with, and which, in the actual circumstances, must necessarily supersede the former use, unless such appear, by express words, or by necessary implication, to be the legislative intent. *Boston Water Power Co.* v. *B. & W. R. R. Co.*, 23 Pick., 360.

Railroad Co. v. *Village of Belle Centre*, 48 Ohio St., 273 (1891), was a suit by the railroad to enjoin the village from taking possession of certain real estate under a judgment of the Probate Court rendered in a proceeding in which the Village had prayed for the appropriation of the real estate for the purposes of public offices and a prison for the Village. It was contended that the Probate Court was without jurisdiction, and its judgment consequently void, *because the Village had no power to appropriate it for the reason that "the property was already devoted to a public use, viz., that of the railroad company, and could not be taken for another and different public use, under the general power possessed by the defendant to appropriate real property for such use."* The Court said (p. 295):

> "All property, however held, is necessarily subject to the legitimate exercise of the power. *It seems to be a well-established rule, however, that property already appropriated*

IN THE PROPER EXERCISE OF THE POWER OF EMINENT DOMAIN, *cannot be taken for another public use which will wholly defeat or supersede the former use, unless the power to make such second appropriation be given expressly or by necessary implication. Railroad Company* v. *Dayton, supra.*"

In *Northern Ohio Ry. Co.* v. *Commissioners of Hancock Co.*, 63 Ohio St., 32, 39, the court said:

> "It is the settled rule in this state that, while property already appropriated IN THE PROPER EXERCISE OF THE POWER OF EMINENT DOMAIN cannot be taken for another public use that will wholly defeat or supersede the former use, unless the power to make the second appropriation be granted expressly or by necessary implication, land held by a corporation, whether acquired by purchase or appropriation, may, subject to that limitation, be made subservient to other needed public uses. *Railroad Co.* v. *Belle Centre*, 48 Ohio St., 273."

Thus in each case in which the Supreme Court of Ohio has had occasion to advert to the rule invoked by the defendants it has carefully limited it to property which has been devoted to a public use *"in the proper exercise of the power of eminent domain"*; and in *Iron R. R. Co.* v. *Ironton, supra, it expressly refused to apply the rule to "lands held by the company* FOR USES AND PURPOSES FOR WHICH IT IS NOT BY LAW AUTHORIZED TO CONDEMN PRIVATE PROPERTY."

It consequently follows that, "under the settled rule of law which existed in the State at the time the State action relied upon as a contract was taken," the plaintiff's right to appropriate extended, if not to all property, at least to *all*

property not previously devoted to a public use "in the proper exercise of the power of eminent domain".

Was the devotion asserted in this case made "in the proper exercise" of that power?

The Realty Company, as we have seen, is nothing but a real estate company. It will not be pretended that it could have condemned land for any purpose, and as a matter of fact it did not even attempt to build the dam or power plants.

The Traction Company is what is known in Ohio as a "street and interurban railroad;" that is, it was organized to operate street railroads both *inside* and *outside* of municipalities. The powers of appropriation conferred upon such corporations (aside from provisions as to elevated roads, occupancy of turnpikes and plank roads, the right to make joint use of tracts, which, of course, are not material here) are as follows:

As to powers *inside* of municipalities, it is provided:

> "When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to *extend its power plant,* such corporation may appropriate so much private property as is necessary *for the extension of such power plant,* or the construction, operation and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway *other than power houses,* machine shops, stations or substations in the manner and subject to the provisions of law

for the appropriation of private property by corporations."

Ohio General Code, § 9115.

As to powers *outside* of municipalities it is provided:

"When necessary to enter upon and use private property *in the construction and operation of such roads*, such companies shall have *the same power of appropriation that steam railroad companies possess.*"

Idem, § 9119.

The power of appropriation conferred upon steam railroads (other than with respect to changes of grade and route and elevated roads) is as follows:

"A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary *for its railroad*, including necessary *side-tracks, depots, work-shops, round-houses* and *water-stations, material for construction, except timber*, a *right of way over adjacent lands* sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains."

Idem, § 8759.

It is clear that these sections do not confer upon the Traction Company any power to appropriate the land here in question for the use to which it has been put. The land in question is situated *outside of a municipality*. As to it, therefore, the eminent domain powers of the Traction Company are *only such that "steam rail-*

road companies possess'' (Sec. 9119), and it is obvious that *steam* railroads have no power to appropriate for power-houses for the generation of *electric* current, whether that current be generated by means of steam or water-power. It is particularly significant, too, that as to the powers that may be exercised by street railroads *within municipalities* the legislature, while giving authority to appropriate land for an extension of an existing power plant, has *expressly denied the right to appropriate any land for a new power-plant* (See 9115 quoted above). It is furthermore significant that it was not until two years after the organization of the Traction Company that the legislature of Ohio, by enacting the statute under which the plaintiff was incorporated, first recognized the development of hydro-electric power as a public use and conferred the right of appropriation therefor; and by that statute the right was limited to *corporations organized for that express purpose.*

If further confirmation were needed for the assertion that the use upon which the defendants rely to defeat this case is not one for which the Traction Company could appropriate property, such confirmation is found in the fact that *the Traction Company did not even attempt to build the plant itself; the whole scheme was carried on in the name and under the cloak of The Northern Ohio Power Company.* And it is settled beyond controversy that that Company could not exercise the power of eminent domain.

Parkside Cemetery Case, supra, pp. 62-65.

It is thus clear to a demonstration that the defendants' use of the land, even though it be a public use, does not constitute a devotion of the

land to a public use *"in the proper exercise of the power of eminent domain"*; and, under the authorities cited, the land is hence subject to the plaintiff's right to appropriate it to its own use.

B.—The plaintiff's charter gives it a right to acquire the land in controversy even though it be legally devoted to a public use.

There are two reasons why the plaintiff has this right:

1.—It is well settled that the rule that property already legally devoted to a public use cannot be taken unless the authority to take it is given in express terms or by necessary implication, does not apply to property that is *not necessary to the proper exercise of the corporate franchises of the company which has made the first devotion.* In order to bring a particular parcel of land within the protection of the rule it must be *so employed in the exercise of the public franchise that the public service cannot reasonably be performed without it.* And the necessity for its use must be one that *arises out of or inheres in its situation,* and not one created by the company claiming the protection of the rule. Nor does the mere convenience of such company amount to such necessity.

Lewis, Eminent Domain, Sec. 418, 442;
Southern Pac. R. R. Co. v. *Southern Cal. R. R. Co.,* 111 Cal., 221;
Peoria P. & J. R. R. Co. v. *Peoria & S. R. R. Co.,* 66 Ill., 174;
Seattle, &c., Co. v. *Bellingham Bay, &c., Co.,* 29 Wash., 491; 92 Am. St. Rep., 907, 913;
North Coast Ry. v. *Northern Pac. Ry. Co.,* 48 Wash., 529, 534, 535;

North Carolina, &c. R. R. Co. v. *Carolina Central Ry. Co.*, 83 N. C., 489;
N. Y. Housatonic & No. N. R. Co. v. *Boston H. & E. R. R.*, 36 Conn., 196;
Scranton Gas & Water Co. v. *Coal & Iron Co.*, 192 Pa. St., 80, 94, and cases there cited;
Phila. & Camden Ferry Co. v. *Intercity R. R. Co.*, 73 N. J. Law, 86.

The land here in question is not necessary to the proper exercise of the corporate franchises of the Traction Company, because, although it be conceded that the Traction Company must have power, it is not necessary that it get it from this particular place. Whatever dependence it has upon the power plants it has erected on this land was voluntarily created by itself for its own private convenience, and this is precisely the thing which the cited authorities hold cannot be considered a "necessity" to the proper exercise of corporate franchises. The public functions of the Traction Company can be performed with equal satisfaction to the public whether it obtain its power from these power plants or from any others that may be located at any one or more of a hundred different places, whereas the public functions of the plaintiff cannot be performed at all except by a utilization of the waters of the Cuyahoga River.

It has been expressly ruled that a street railroad cannot condemn a site for a power house upon a stream for the very reason that the public functions of such a company do not require a particular location for such a plant, and "the generation of the power to propel cars is the *private* business of the company."

In Re Rhode Island Suburban Ry. Co., 22 R. I., 457.

The principles and reasoning of that decision have been approved, followed, and applied in many other cases.

Eldridge v. *Smith*, 34 Vt., 484;
In re N. Y., N. H. & H. R. R. Co. v. *Kip*, 46 N. Y., 546, 552;
Boston & Maine R. R. v. *City of Franklin* (N. H.), 84 Atl., 44.

And the doctrine was stated in Ohio at an early date in the classic opinion of RANNEY, *J.*, in the leading case of

Giesy v. *Cincinnati W. & Z. R. R. Co.*, 4 Ohio St., 308,

in which a *depot* was held to be a public use because it is essential to the operation of a railroad *and must necessarily be situated at a particular place.*

2.—We have thus far discussed the case upon the assumption, most favorable to the defendants, that the plaintiff possesses a mere general power of eminent domain such as would not enable it to appropriate any land legally devoted to a public use.

We now propose to show that if, as claimed by the defendants, the land here in controversy be devoted to a public use, the plaintiff's charter nevertheless gives it the right to acquire it.

As heretofore pointed out, all property of all kinds, even though legally devoted to a public use, is subject to the power of eminent domain.

Cincinnati v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390;
Long Island Water Supply Co. v. *Brooklyn*, 166 U. S., 685;
Railroad Co. v. *Village of Belle Centre*, 48 Ohio St., 273.

The question which arises when one corporation attempts to appropriate property already devoted to a public use is not as to the power of the legislature to authorize the taking but as to whether or not it has in fact authorized it. And the settled rule is that such authority may be conferred either expressly or by *necessary implication;* and such implication may arise either from the language of the charter *or from an application of the charter to the subject-matter.* That is to say, if powers expressly granted cannot be exercised without the authority to take property already devoted to a public use, such authority is necessarily implied. Or, more specifically, if the plaintiff cannot accomplish its corporate purpose and right of building a hydro-electric plant upon the Cuyahoga River without appropriating property already devoted to a public use the right to make such appropriation is necessarily implied.

In *Hickok* v. *Hine,* 23 Ohio St., 523, a landowner upon a navigable river sought to enjoin the county commissioners from building a bridge over the river in such a way as to obstruct navigation. The defendants contended that with respect to this bridge they had succeeded to the rights of a plank-road company, and *the inquiry was whether that company had power to build such a bridge.* The court referred to the act incorporating the company and said (p. 530):

> "That the act conferred power to build a bridge across Grand River is not disputed. *Though not given in express terms, it is necessarily implied in the grant of power to construct a road from one point to another, between which points the river must be crossed.*"

It then proceeded:

"But does it confer power to build a bridge of a character and at a place that will obstruct the navigation of the river? Such a power is not expressly given; * * *. There is no apparent necessity for building the bridge at a place, or in a manner, that will obstruct the navigation of the river. On the contrary, it is quite apparent that it might be constructed where it would not have that effect; or that it might at least be constructed with a draw, in such a manner as to be consistent with the use of the river for purposes of navigation.

"Since, then, the act confers no express power to obstruct the navigation of the river, and it was *not necessary for the accomplishment of the purpose contemplated by the general power granted,* the obstruction of the river finds no warrant in the act. Nor can it be claimed under the general powers conferred by law upon the commissioners.

"Powers in derogation of the rights of individuals, or of the public, conferred in general terms upon corporations or public officers, must be construed with some degree of strictness. Where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, *or by necessary implication.* Such implication can arise only when *requisite to the exercise of the power expressly granted,* and it can be extended no further than the necessity of the case requires. *Springfield* v. *Railroad,* 4 Cush., 63; *Fall River, etc.,* v. *Railroad,* 5 Allen, 221."

In the case at bar the place where the plaintiff's plant is to be built is expressly and specifically

fixed by its charter, and the right to put it there is "necessary for the accomplishment of the purpose contemplated by the general power granted."

In *State ex rel. Attorney General* v. *Railroad Co.*, 37 Ohio St., 157, 176, 177, it was said:

> "We do not question the power of one corporation authorized to appropriate land for a public use, to acquire the property of another or of the public, also devoted to the same or another public use, but such power must be conferred by express terms, *or by necessary implication.* Such implication does not arise *when the express powers conferred can by reasonable intendment be exercised without such appropriation. Matter of B. & A. R. R. Co.*, 53 N. Y., 574; *Inhabitants of Springfield* v. *Conn. R. R. Co.*, 4 Cush., 63; *Stevens* v. *Paterson & Newark R. R. Co.*, 5 Vroom, 532. * * *
>
> "We do not question the power of the legislature to authorize a change of public uses, but in the terms of the syllabus in *Hickok* v. *Hine*, 23 Ohio St., 523; 'where the legislature has power to require one public easement to yield to another more important, the intention to grant such power must appear by express words, *or necessary implication;* and such implication arises only when *requisite to the enjoyment of the powers expressly granted,* and can be extended no farther than such necessity requires."

In *Ravenna* v. *Pennsylvania Co.*, 45 Ohio St., 118, the question was as to the power of a municipal corporation to make an ordinance. After saying that the municipality did not possess the power unless it had been conferred by statute, the court said:

> "Except as to *incidental powers, such as are essential to the very life of the corpora-*

tion, the presumption is that the state has granted in clear and unmistakable terms all it has designed to grant at all. Doubtful claims to power are resolved against the corporation. Cooley on Constitutional Limitations, 233, 234; *Minturn* v. *Larue,* 23 Howard (U. S.), 435; *Bloom* v. *Xenia,* 32 Ohio St., 465."

In *Toledo Consol. St. Ry. Co.* v. *Toledo El. St. Ry. Co.,* 50 Ohio St., 603, 36 N. E., 312, the Electric Company, acting under a grant from the city council of the right to acquire, construct and operate a street railway, sought to condemn the right to use the tracks of the Consolidated Company. The appropriation was resisted upon the ground that the property was already devoted to a public use and the statute which attempted to give the power to appropriate was unconstitutional. One section of the statute (R. S., 3438) in general terms conferred upon city councils the power to grant to street railway companies the right to construct their railways therein, with a *proviso* that authority to occupy the tracks of existing street railways should not be granted "for more than one-eighth of the entire distance, between the termini of the route" of the company to which the grant was made. Another section of the statute (R. S., 3440) provided that where the council made such a grant the company to whom it was made "*may appropriate any property necessary therefor* where the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway." This section was amended in 1890 by the addition of a specific and express authority to appropriate the joint use of the tracks. This amendment was claimed to be unconstitutional. The court left this question undecided and *held that the general authority*

given by Section 3440 before the amendment was a sufficient grant of authority to sustain the condemnation proceedings.

The court said (pp. 614, 615):

> "The real question here presented is, whether the provisions of the original section authorize one street railway company to appropriate to its use the tracks of another company, subject to the restrictions contained in Section 3438 of the Revised Statutes."
>
> * * * * * * *
>
> "By the terms of the original Section 3440, the company 'to whom the grant is made *may appropriate any property necessary therefor*, when the owner fails to expressly waive his claim to damages by reason of the construction and operation of the railway.' The authority of the company to appropriate appears to be as comprehensive as the authority of the municipality to make the grant, and INCLUDES THE RIGHT TO APPROPRIATE ANY PROPERTY, OF WHATEVER NATURE, NECESSARY TO RENDER THE GRANT EFFECTIVE. Section 3438 was in force with Section 3440 before the passage of the amendatory act of 1890; and unless the right granted under the former section to one street railway company to use the existing tracks and structures of another company could be enforced by appropriation proceedings, the power to make the grant would be futile, for it could, in every instance, be defeated by the refusal of the owner to consent to such use, or come to an agreement concerning the damages; a result evidently not intended by the legislature. *The terms of the statute prior to the amendment are broad enough to authorize the appropriation sought by the defendant in error, and it is not apparent why their general purport should be restrained.* The context does not require it."
>
> * * * * * * *

"It is further claimed by the plaintiff in error that the appropriation was unwarranted because it practically defeated the public use to which the property appropriated was already devoted. If that was the effect of the appropriation, it is clear it could not be made, unless the power to make it was granted expressly, *or by necessary implication. Railroad Company* v. *Belle Center*, 48 Ohio St., 273. *But, as has been shown, the power to make the appropriation was so granted.* * * *

That decision is controlling here. The provision in that case was that the company "may appropriate any property necessary therefor," and this is certainly not broader than the provision of Section 10,128 which confers upon the plaintiff the right to appropriate any private property deemed necessary for its purpose. In that case it was held that the right included "the right to appropriate any property, of whatever nature, necessary to render the grant effective", even though it was devoted to a public use, and the same construction must be given to the plaintiff's charter in this case.

In *Housatonic &c. R. R. Co.* v. *Lee & H. R. R. Co.*, 118 Mass., 391, the court, after stating the rule that it is not to be presumed that the legislature intended to allow land devoted to one public use to be subjected to another unless the authority be given in express words *or by necessary implication*, said:

"And such implication can only be found in the language of the act, *or from the application of the act to the subject matter*, so that the railroad could not be laid, in whole or in part, by reasonable intendment on any other line."

This same principle of construction is applied in Ohio; for in *Shaver* v. *Starrett*, 4 Ohio St., 494, 499, it was said to be a "familiar maxim" that "a law is to be construed with reference to its subject-matter."

In *Providence &c. R. R. Co.* v. *Norwich &c. R. R. Co.*, 138 Mass., 277, it was said:

> "When it appears by statute, *or by the application of the statute to the subject matter*, that the contemplated road cannot reasonably be built without appropriating land already devoted to a public use, an implication arises that the legislature intended that such appropriation might be made."

In that case a statute of Massachusetts provided for the establishment of a union passenger station at Worcester for the joint use of all the railroads entering the city. The statute authorized the different companies to change and extend the location of their tracks so as to reach the new station, but it did not define the locations to be occupied. It was shown that it was not feasible for the Norwich and Worcester Railway Company to reach the new station without taking a part of the right of way of the Providence and Worcester Railway Company, and it was held that the act conferred by necessary implication the right to do so. Speaking of this case LEWIS says:

> "In this and in many similar cases, where the authority was given by special act, the location of the proposed railroad was more or less completely defined by the legislature. In such cases, if in carrying out the power so expressly given, it becomes reasonably necessary to take property already devoted to public use, there is a necessary implication

that the legislature so intended. The necessity for the taking is created directly by the legislature itself."

Lewis, Eminent Domain, § 420.

Lewis further says:

"It is manifest, however, that even a railroad company which is organized under a general law may show a reasonable necessity for taking part of the right of way of another road, as when it is located through a town in which another road has been previously built, and the topography or other conditions are such that the new road cannot reasonably be located so as to accommodate the public and accomplish the object in view without either encroaching on the right of way of another company, or incurring ruinous or greatly increased expense. The same necessity may arise in mountainous countries, or else the first company might preclude all others from reaching certain localities."

Lewis, Eminent Domain, § 420, p. 758.

Testing the plaintiff's rights "by the application of the statute to the subject matter," as authorized by the cases above cited, we find that the plaintiff has been granted the right to construct a hydro-electric plant upon the Cuyahoga River. This is the only purpose of the plaintiff's incorporation, the express purpose and sole object of the grant. The plant cannot be built in any other place; and if the land here in controversy be devoted to a public use, the plant cannot be built—the grant cannot be made effective or carried out even in part—unless the plaintiff have the right to appropriate property already devoted to a public use. The right is thus conferred *by*

necessary implication, because it is "requisite to the enjoyment of the powers expressly granted" (37 Ohio St., 157, 177)—because "the express powers conferred can (not) by reasonable intendment be exercised without such appropriation" (*id.*, p. 176)—because the right is "essential to the very life of the corporation" (45 Ohio St., 118, 121).

We are, of course, aware that it has been many times asserted that the State cannot authorize the appropriation of property already devoted to a public use when the appropriator is merely to continue to employ it for the same use in the same way—that "where there is no change in the use there cannot be a change in ownership under the law of eminent domain."

Cary Library v. *Bliss,* 151 Mass., 364, 379;

Suburban R. R. Co. v. *Metropolitan W. S. El. R. R. Co.,* 193 Ill., 217, 223;

West River Bridge Co. v. *Dix,* 6 How., 507, 537;

Lewis, Eminent Domain, Sec. 440, and other cases cited in Notes 83, 84, 85.

We assume this to be the law; and in asserting that the plaintiff may appropriate the land in question, although it were devoted to a public use, we do not now counter to that principle. On the contrary, the plaintiff's use and the defendants' use are different in every important respect.

The Act of 1904, under which the plaintiff was incorporated, provides for the utilization of the rivers and streams of Ohio in an important public service. It is, in its purpose and effect, a part of the nation-wide movement for the conservation and development of the natural resources in an

enduring and comprehensive manner—a movement which this court has materially assisted by a broad interpretation of State and Federal statutes having this object in view.

The plaintiff, after extensive investigations carried on by eminent engineers, has formulated a plan for the development of the Cuyahoga River as a whole. It proposes, by means of storage reservoirs, canals and conduits, to regulate the now variable and uncertain flow of the stream at the uniform rate of 300 cubic feet per second. By means of this regulated flow and the power stations to be erected by it, the plaintiff will be enabled to develop and furnish to the public 20,827 electric horsepower for continuous service ten hours daily, or a net delivery of approximately 55,000,000 kilowatt hours per year (Rec., p. 240). The territory to be served embraces a population of over 1,000,000 persons; and by reason of the great demand for light, heat and power, there is a ready market and need for the plaintiff's entire output. And the incidental benefit which this regulation of the flow of the river confers upon the public by doing away with flood damages at certain seasons and periods of drought at others is, of itself, a public use of vast importance.

The defendants' use is the very antithesis of this conservation and regulation. The amount of power they develop by their hydro-electric plant is but 2,700 horsepower *and this for only seven months in the year.* Their plant, indeed is but a "booster" for their steam plant, and *instead of being a development of the river, it is a destruction of it.* In short, the defendants' use is, in reality, nothing more than the old familiar millpond—a water power on one's own land for one's own individual use—and the real claim of the

defendants in this case is that in order that they may continue this use of a mile and a half of the river the people of Ohio must forever be deprived of the advantages of the millions of horsepower that can be produced—all development of sixty-eight miles of the river must be abandoned for all time and nearly nine-tenths of its capacity for public service must go permanently to waste.

We have no desire to belittle the public service which the defendant Traction Company is rendering along other lines in other fields. Its service as a railroad is important. But that service has been and can be performed without destroying the whole Cuyahoga River; and the only proposition we urge here is that the Traction Company's own private convenience must yield to the public welfare.

The Legislature has determined upon the development of the rivers and streams of the State and organized the plaintiff as its agent for this purpose; and its purpose as well as the grant it has made to accomplish that purpose should be given effect.

CONCLUSION.

The case may be accurately summed up in a sentence written by Mr. Justice Holmes in *Denver & Rio Grande R. R.* v. *Arizona & Colorado R. R.*, 233 U. S., 601, 604: "The defendant has gone ahead since the suit was begun, but of course has acquired no new rights by doing so."

The judgment should be reversed with costs and with instructions to the State court to empanel a

jury and assess the defendants' compensation without reference to the structures erected upon the land subsequent to the commencement of this proceeding.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,

Counsel for Plaintiff-in-Error.

February, 1917.

Supreme Court, U. S.
FILED
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Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

WILLIAM Z. DAVIS, Columbus, Ohio,
JOHN L. WELLS
CARROLL G. WALTER } New York,
Counsel for Plaintiff-in-Error.

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Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY, Plaintiff-in-Error, against THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, Defendants-in-Error.	No. 342.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR.

Chronological Statement.

The defendants introduce a chronological statement of facts, which we will repeat with our comments:

> *"November 24, 1897, The Akron, Bedford & Cleveland Railroad Company secured a report on the water power at Cuyahoga Falls, where the property which the plaintiff is endeavoring to condemn, is located."*

But no action was taken on that report, or on any report, and nothing was done which even suggested devotion to a public use, until the land was deeded by the Northern Realty Company to the Northern Ohio Power Company, January 31st, 1911, two and a half years after the plaintiff obtained its charter and adopted its appropriation resolution of June 4th, 1908.

> *"December 14, 1897, The Akron, Bedford & Cleveland Railroad Company purchased this property and took title in the name of Henry A. Everett. This property was purchased for the purpose of water power development."*

But this Railroad Company had no right to purchase for water power in 1897, because such purchase was foreign to its corporate purpose. Nor did it have the power to purchase and hold land for purpose of development (*Case vs. Kelly*, 133 U. S., 21). What appears in the record is that the Railroad Company furnished money for this purchase, but the use of the money was unauthorized, and the purchase was dishonest, for it was taken in the name of Everett to defeat the lien of the bondholders (Record, p. 61).

The purchase could not have been for the development of water power in the sense in which the defendants now use that term because the statute authorizing such developments was not passed until 1904—seven years after the alleged purchase of the Akron, Bedford & Cleveland Railroad Company.

Furthermore, the witness Moore testified that the Realty Company was formed for handling property that was not in daily operation in connection with the Traction Company (Record, p. 73), and this was one of the properties named.

*"May 26, 1899, * * * Nov. 12, 1902, * * * Dec. 29, 1902."*

These are mere mergers and consolidations of street railroad companies, and could not affect property that was being held by Everett as Trustee.

"October 8, 1906, Resolution of the Board of Directors of the Northern Ohio Traction & Light Company, looking to the development of the property. Work was done from time to time in the way of reports of engineers."

But there was nothing done which would constitute a devotion to a public use. The work was all nebulous, the property was not even surveyed, there was no adoption of a location or setting apart of the property for a public use. On the contrary, in 1907 the Traction Company was negotiating with Willis Bacon to sell the property to a corporation which Bacon was to form, and from which the Traction Company was to receive power and light (Record, pp. 227-230).

"1897 to 1910. Various taxes and other payments made from time to time by the Akron, Bedford & Cleveland Railroad Co. and the Northern Ohio Traction Company on account of this property."

Such payments prove nothing as to devotion to public use. We may even construe them charitably as an honest payment, but every man may own property and he may pay taxes and this is the first time that it has ever been suggested that the payment of taxes or the ownership of property *ipso facto* devotes the property to a public use.

"1908. Plaintiff was organized, and in December adopted the Von Schon plan of development."

And, plaintiff adopted a specific location upon this property on June 4, 1908. It gave notice to the defendants by the service of summons in the former condemnation case commenced in June 1908 (Rec. pp. 128-140). This location has been adjudged specific by the decision of the highest Court of the State.

All steps thereafter taken by the defendants were subsequent in time, and give the defendants no rights as against the plaintiff.

"February 25, 1910. Resolution of the Board of Directors of the Northern Ohio Traction and Light Co. to purchase 57 additional acres of land and to construct a new power plant on this property."

But this is the first indication of any intention on the part of the defendants to make any utilization of this land, and when read in connection with the testimony concerning the Northern Ohio Power Company, the resolution is shown to mean that the Traction Company will construct the new power plant under the Charter of a dummy, *and for the uses of a dummy.* Prior to this time, the property had been owned by individuals or private corporations, and had been used for "a little dancing and roller skating."

"December, 1910. Active work commenced by the Northern Ohio Traction & Light Company in the construction of its plant on this property."

No part of this work was done upon the property described in this petition. It was only for the steam plant. Moreover, the work was done for the dummy to be created later, and to whom the property was deeded January 31, 1911.

Furthermore, all this work was done with full notice that this property had already been devoted to the plaintiff's public use under a valid statute.

> *"December 20, 1910. Deed from Henry Everett to Northern Realty Company."*

This deed was made while this suit was pending, which was notice to the Northern Realty Company and its grantees that plaintiff had devoted this property to a public use. And the grantee took subject to the proceeding.

> *"January 31, 1911. Deed from Northern Realty Company to Northern Power Company."*

But, the grantor and grantee took subject to the proceedings of plaintiff already begun.

> *"February 24, 1914. Deed from Northern Power Company to Northern Ohio Traction & Light Company."*

But the grantor and grantee both took subject to the proceedings of plaintiff. The entry by these parties for the construction of dams, power houses, etc., is a confiscation of plaintiff's property rights and an impairment of its charter.

Reply to Defendant's Point II.

AS TO FEDERAL QUESTIONS BEING INVOLVED.

1. The defendants make the contention that this case does not come within the *third* clause of §237 of the Judicial Code (which gives jurisdiction to review decisions against a title, right, privilege or immunity specially set up and claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States) because the plaintiff's right to condemn "is based solely upon the Constitution and laws of the State of Ohio and its charter secured under those laws" and is thus a *"State right"* and not a Federal right (Brief, pp. 22, 23, 6).

This contention is wholly destroyed by the obvious fact, clearly admitted by the defendants in another portion of the brief, that although the right to condemn has its source in a State grant,

> "It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution" (Brief, p. 6).

And

> "Plaintiff's claim that this right is a contract right and that it has been impaired raises the Federal question, and plaintiff's further claim that this right is a property right and that it has been deprived of this property without due process raises a Federal question" (Brief, p. 8).

Moreover, the contention that this Court has jurisdiction only where the right asserted is origi-

nally derived from and has its source in a *Federal* enactment is utterly at variance with the decided cases. Under that theory the *Dartmouth College case* could not have come to this Court. Neither could *Piqua Branch State Bank vs. Knoop,* 16 How., 369, because in that case, as in this, the right relied upon was one conferred by Ohio statutes. Neither could *Ettor vs. Tacoma,* 228 U. S., 148, have been brought here, because the right asserted in that case was created solely by a State statute. Neither could this Court have taken jurisdiction of *Detroit United Railway vs. Michigan,* 242 U. S., 238, because the contract asserted in that case arose solely from a State grant. Illustrations might be multiplied indefinitely, but these are sufficient to show the absurdity of the point.

2. The defendants further contend that this case does not come within the *second* clause of §237 of the Judicial Code (which gives jurisdiction to review decisions in favor of the validity of a statute of or authority exercised under any State, the validity of which is drawn in question on the ground of their being repugnant to the Constitution, treaties or laws of the United States) because, as they say, "there is nothing in the record to show that the State Court sustained the validity of the defendants' devotion of property to a public use" (Brief, pp. 23, 24).

This, of course, is but another way of saying that jurisdiction does not exist because the State Court may have rested its judgment upon a finding that the plaintiff had not established inability to agree or the necessity for the appropriation—a contention which we will discuss in the next point. If the State Court did not dispose of the case upon those

grounds, which it could not do on this record, it must have sustained the validity of the defendants' alleged devotion of the property to a public use because that is the only other ground upon which a judgment adverse to the plaintiff's right to acquire the land could conceivably rest.

> "It has never been required that a Federal right must be denied in terms, but it has been uniformly held that it is sufficient if the State court necessarily denied it in the judgment rendered."
>
> *St. Louis &c. Ry. Co. vs. Starbird,* per Mr. Justice DAY, decided April 30, 1917, not yet reported.

3. The defendants attempt to dispose of Point VI of our original brief (wherein it is set up that the Ohio Public Service Commission Act of June 30, 1911, is a subsequent law to which the State Court gave effect) as follows:

> "We did not mention this Ohio Commission Act for the reason that there is nothing whatever in the record to show any connection between it and defendants' devotion of the land to a public use, and on that account we did not consider that the point required an answer" (Brief, p. 24).

Of course the *"record"* does not show the statute under which the defendants acted. It is neither necessary, customary, nor proper to put State statutes in evidence in proceedings pending in State Courts. The State Court was obliged to take judicial notice of the statute and this Court, on writ of error, is obliged to do the same thing. The statute itself (quoted at pages 32 to 40 of the ap-

pendix to our brief) clearly shows that both the Traction Company and the so-called Northern Ohio Power Company were subject to its provisions, and that the right of each to purchase, sell, or lease the stock, property, plant, or business of the other, as well as the right of each to contract with the other with reference to the operation of their plants in connection with each other, was fixed, governed and controlled by the statute; and in determining the effect of the various purchases and sales between these companies shown in the record, the State Court was necessarily governed by this statute, and in giving effect to these purchases and sales it necessarily gave effect to the statute.

See *St. Louis, &c., Ry. Co. vs. Starbird*, per Mr. Justice DAY, decided April 30, 1917, not yet reported.

4. The defendants' attempt to dispose of Point V of our original brief (wherein it is set up that their alleged devotion of the land to a public use was a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract) by the bare assertion that none of the cases cited by us "sustain this position" (Brief, p. 24).

No attempt is made to explain why the cases are not in point. If there be a flaw in our argument, surely the defendants could have pointed it out.

Reply to Defendants' Points I, III and IV.

AS TO WHETHER THE FEDERAL QUESTIONS CONTROL THE DECISION AND WHETHER INABILITY TO AGREE NECESSITY FOR THE APPROPRIATION WERE SHOWN.

The defendants are forced to concede that in a case of this kind

> "this court will examine the record to see whether the non-Federal question is sufficient of itself to sustain the judgment of the State court without reference to the Federal question *and is a good and valid defense*" (Brief, p. 14. See, also, p. 21).

They "agree that this court must determine this issue" (Brief, p. 14), that even an independent non-Federal question "must have some support in the evidence" (p. 21); and that there must be "evidence to sustain the judgment" (p. 14).

They attempt to hedge about these concessions by the limitation that

> "This court will not *analyze and consider conflicting testimony* on an issue of fact which is fairly presented by the record" (Brief, p. 14);

and repeatedly throughout their discussion of the questions of inability to agree and necessity for the appropriation they speak of the absence of any right or duty of this court to determine "conflicting evidence" or "examine conflicting testimony" (Brief, pp. 18, 20, 21).

But even if this limitation be sound in law, it is wholly inapplicable here; for THERE IS NO CONFLICTING TESTIMONY OR CONFLICTING EVIDENCE IN THIS CASE. We do not ask the court to resolve a *conflict of evidence*, but only to examine *uncontradicted and undisputed evidence* in order to determine whether there is any basis for an adverse finding by the State court and "in order to deter-

mine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right."*

Another distinction attempted to be drawn by the defendants is that the rule that this court will examine the evidence in order to determine whether a finding of the State Court is supported by evidence applies only where the court is deciding a Federal question and has no application where the court is determining whether there is a valid non-Federal ground upon which the judgment can validly rest. Thus, at pages 20 and 21 of their brief they refer to some of the cases cited at pages 37 to 43 of the brief submitted by us in opposition to the motion to dismiss and say of them

> "In each one of these cases the first question considered by this court was whether a Federal question was presented. *In no one of them was it suggested that, in addition to an alleged Federal question, a non-Federal question was presented.* In each case this court, having decided that a Federal question was presented, proceeded to consider to what extent it would examine the facts. * * * These authorities have no bearing upon the issue presented in this branch of this case. They do not sustain plaintiff's apparent contention that even upon the assumption that separate and distinct non-Federal questions are presented, this court will examine conflicting testimony *in order to reach its own*

*Mr. Justice PITNEY in *Carlson vs. Curtis*, 234 U. S. 103, 106.

conclusion on the question whether a decision on any such non-Federal question in favor of a successful party in the State Court was justified."

As already stated, there is no conflicting testimony in this case; and apart from this it is very clear that the above quotation from the defendants' brief contains a very erroneous statement of what the cases hold. In one of them (*Creswill vs. Knights of Pythias,* 225 U. S. 246) it was very distinctly suggested that a non-Federal question was presented and there was actually a *dissent* in this court upon the ground that the State court's decision upon the non-Federal question prevented a review of the judgment. Despite this fact this court (as admitted by the defendants themselves on page 12 of their brief) examined the non-Federal question (laches) and in the language of the defendants, "reversed the judgment *as it found no evidence to sustain this defense*" (Brief, p. 12). In another of the cases referred to (*Southern Pacific Co. vs. Schuyler,* 227 U. S 601) a non-Federal question was presented and this court expressly stated that the non-Federal ground would have required a dismissal of the writ of error but for the fact that they were called upon to examine the evidence (p. 611). As a result of this examination of the evidence the court took jurisdiction and would have reversed the judgment had it not been that the *merits* were in favor of the defendants. In still another of the cases referred to (*Bowe vs. Scott,* 233 U. S. 658) it was distinctly set up that the judgment rested upon a non-Federal ground and this contention was made the basis of a motion to dismiss. In yet another of the cases cited

by us but omitted from the defendants' brief (*Cornell Steamboat Co. vs. Phoenix Construction Co.*, 233 U. S. 593) a non-Federal question was presented and made the ground of a motion to dismiss, yet the court took jurisdiction and examined a question of negligence. These authorities squarely hit the case at bar.

It thus comes about that the net result of the elaborate discussion in Points I, III and IV of the defendants' brief (which, indeed, is but a reargument of the propositions urged in their motion to dismiss) is a concession by the defendants that, whether the questions of inability to agree and necessity for the appropriation be regarded as so interwoven with the Federal question as not to constitute an independent matter or whether they be regarded as purely local questions separate and distinct from the Federal question, *this court must determine whether, upon the evidence in the record, inability to agree and necessity for the appropriation have been shown.*

These questions are adverted to at pages 14 and 25 of our original brief and are more fully discussed at pages 46 to 55 of the brief filed in opposition to the motion to dismiss. We respectfully refer the court to those portions of the briefs and will here confine ourselves to an answer to the statements now made by the defendants' upon these points.

Before taking up those subjects, however, we call attention to a statement in the defendants' brief which clearly shows that they are *not* State questions because they are so interwoven with the Federal question as not to be an independent matter sufficient to sustain the judgment without any

decision upon the Federal question. At page 16 of their brief the defendants refer to the motion which was made at the close of the trial to dismiss the petition "for the reason that there is no evidence proving that there was any attempt or failure to agree * * * and that the plaintiff has no right to appropriate the property described in the petition." And of this motion the defendants say:

> "It is *not clear* whether counsel for defendants meant by the last part of his motion that for the reason mentioned, to wit, failure to prove any attempt or failure to agree, plaintiff 'has no right to appropriate the property,' or whether by the latter part of his motion counsel meant that *under all of the evidence covering the several points of defense* 'plaintiff has no right to appropriate the property.' It may be that this motion to dismiss should be construed to cover *not only the defense that plaintiff had failed to prove inability to agree, but also had failed to prove necessity for the appropriation, and also that plaintiff had no right to appropriate because defendant had already appropriated the property to a public use.*"

The very ambiguity here suggested by the defendants themselves and their claim that the motion to dismiss for the reason that the plaintiff had "no right to appropriate" included the questions of inability to agree and necessity for the appropriation as well as the question of the effect of the defendants' alleged devotion of the property to a public use, clearly shows that even in their own minds they do not separate the so-called non-Fed-

eral questions from the Federal question, but, on the contrary, treat the one ultimate question as to the right of the plaintiff to acquire the land as involving and including *all the questions in the case* and recognize that the questions as to inability to agree and necessity are merely subsidiary—mere premises from which a conclusion as to the existence of the ultimate Federal right here asserted is to be reached.

Inability to Agree.

On this point the defendants say:

> "The record shows very clearly that the plaintiff was advised of the fact that the property was *owned* by The Northern Ohio Traction and Light Company and yet, with this knowledge, commenced to negotiate with The Northern Realty Company for the purchase of this property on January 16, 1911." (Brief, p. 14.)

Reference is then made to the two written offers addressed to the Realty Company which are mentioned on page 47 of our brief in opposition to the motion to dismiss. It is then stated that "there was some discussion between the representatives of the plaintiff and the representatives of The Northern Realty Company between January 16th and 20th, 1911, the principal conference being held on January 20th, the day on which this suit was instituted," and that Charles Currie, Vice-President and General Manager of the Traction Company, "took some part in this discussion." Reference is then made to the question put to Mr. Bacon as to whether he was talking to Currie be-

cause he represented the Traction Company, to which question the defendants state that he answered "No.' The complete answer is: "No, because he represented he had the matter in hand for selling the property, him and Mr. Davis." Comment is then made upon the alleged shortness of time. The defendants further intimate that there was some obligation on the plaintiff to cross-examine Currie with reference to the conference he had with Mr. Bacon, although Currie was called as a witness for the defendant and the subject was not gone into on his direct-examination. From all this the conclusion is drawn:

> "In this condition of the evidence a decision by the State court that plaintiff had failed to establish inability to agree would be fully justified" (Brief, p. 16).

And that:

> "It is further clear that the record shows an attempt by plaintiff to prove inability to agree and *an attempt by defendants to show that no sufficient effort had been made by plaintiff in this respect to meet the requirements of the statute.* This court will not analyze and construe the evidence in a case of this kind. This court will do no more than determine that this independent non-Federal question is broad enough to justify the decision of the State court and is a good and valid defense, and that the trial judge would have been justified, under the evidence presented, to sustain defendants' contention on this point" (Brief, pp. 16, 17).

The defense could not be "good and valid" unless there be evidence to sustain it. In what way did the defendants attempt to show that no sufficient effort had been made by the plaintiff? Where is the evidence that would justify a finding that inability to agree was not shown? The defendants do not refer to any and there is not a line nor a word nor a syllable of such evidence in the record. The only "attempt by defendants to show that no sufficient effort had been made" was the *bare assertion of counsel;* and even now counsel do not refer to a single page of the record where this Court will find any evidence which by any stretch of the imagination could be conceived as sufficient to justify the finding of failure to prove inability to agree which they seek to show the State Court may have made. There is no conflicting evidence for the Court to analyze. The testimony of Bacon and Palmer is unimpeached, uncontradicted, undisputed. If Currie had gone on the stand and denied that he had these conferences with Bacon or denied that he had said there was "nothing doing" or denied that he had referred Bacon to Christy, then a conflict of evidence would have been presented. But Currie did nothing of the kind. The subject was not gone into on his direct-examination, and of course there was no occasion for the plaintiff to question him about it on cross. It would have been improper to do so.

Neither could the State Court have found that there was "not time enough" to have the question of selling the property "presented to and considered by" the boards of directors of the Realty Company and Traction Company as suggested on pages 15 and 23 of the defendants' brief. This is not a case

in which a proceeding has been commenced on the theory that the refusal of the landowner to give an answer one way or another establishes inability to agree. Both Christy and Currie announced clearly and emphatically that there was "nothing doing," that "they would not part with the property at any price," that they "would not entertain any proposition for the purchase of it," and that "the property was not for sale" (Rec., pp. 46, 54). They did not want time to consider the matter. They gave a positive answer on the spot. And there is not the slightest suggestion anywhere in the record that they were not fully authorized to give a final answer for both corporations.

As stated in our brief on the motion to dismiss the contention that plaintiff failed to show inability to agree is nothing but a *quibble* over the question of "ownership" as between the Rea'ty Company and the Traction Company; and even now the defendants squarely base their contention upon the proposition that the record shows that the plaintiff "was advised of the fact that the property was owned by The Northern Ohio Traction and Light Company, and yet, with this knowledge, commenced to negotiate with the Northern Realty Company."

The plaintiff was *not* advised that the Traction Company was the owner (See Record, bottom of page 48 and top of page 49), and such is not the fact. Where is the evidence of the Traction Company's ownership? The defendants refer to none. On the contrary, their own chronological statement shows that on December 20, 1910, the land was conveyed by Everett to the Realty Company by an absolute deed; that this suit was commenced on Janu-

ary 20, 1911; that the Realty Company conveyed the land to the North Ohio Power Company on January 31, 1911; and that it was not until February 24, 1914, that the Northern Ohio Power Company conveyed it to the Traction Company, *which conveyance was excluded from evidence by the Trial Court* (Record, p. 151).

And if, as claimed by the Traction Company, the Realty Company was *its trustee,* then the negotiations had with the Realty Company were amply sufficient by virtue of the express provisions of §11039 of the Ohio General Code quoted at page 52 of our brief in opposition to the motion to dismiss. Even if the State Court found everything that the Traction Company claimed, it was bound by this statute to hold that the negotiations with the trustee (Realty Company) were sufficient. This Court cannot reach the conclusion that it has no jurisdiction by assuming that the State Court deliberately violated a State statute. *Nor can this Court hold, on the merits, that inability to agree was not shown, because this statute is clear and controlling.* It expressly authorizes negotiations with the owner *or his trustee.*

Necessity for the appropriation.

The defendants' argument upon this subject is made up of such assertions as these:

> "Under plaintiff's plan of development, defendants' property is not needed" (Brief, p. 17).
>
> *"In this condition of the evidence* it is perfectly clear that the decision of the trial judge to the effect that plaintiff has failed to establish necessity to appropriate would be fully

justified. We cannot know whether the court based its judgment on this proposition but, in view of the fact that *the evidence* would have justified the judgment on that basis, this court will not take jurisdiction on any theory that this independent non-Federal question was not a valid and good defense and sufficient to sustain the judgment" (Brief, p. 17).

"* * * There is nothing in the record to justify a description which would include land one hundred feet wide on each side of the river. Why not make it two hundred feet, or only fifty feet? There is nothing to show any necessity for limiting the tract to one hundred feet on each side of the channel, nor in fact for extending the tract to that width. *The evidence* shows that the description was arbitrary and without any foundation of necessity" (Brief, p. 28).

Where is the evidence about which the defendants talk? They do not refer to any *evidence* at all. They simply make assertions.

The truth of the matter is that the land in question lies within the limits of the plaintiff's right of way as fixed in its articles of incorporation (see pages 9 and 25 of our original brief) and it is little short of absurd to talk about there being no necessity for the plaintiff's having the land within those limits. The land constitutes the bed and banks of the river and it is beyond comprehension how the plant could be constructed without it. Certainly the plaintiff would not indulge in prolonged and expensive litigation in order to establish its right to pay "just compensation" for something it does not need.

Moreover, the propriety and necessity for the appropriation are questions committed by the legislature to the discretion of the agency in which the power of eminent domain is vested—in this instance the plaintiff.

Giesy vs. Cincinnati, W. & Z. R. R. Co., 4 Ohio St., 308;

Kramer vs. Cleveland & Pittsburg R. R. Co., 5 Ohio St., 140, 146, where it is said that the exercise of the power of eminent domain "can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted";

Bowersox vs. Watson, 20 Ohio St., 496. 507;

Cincinnati vs. Louisville & Nashville R. R. Co., 223 U. S., 390, where this court in a case involving the power of eminent domain in Ohio said that when the use is public "the propriety or expediency of the appropriation cannot be called in question by any other authority."

The statute requiring the corporation to prove the necessity (§11046) does not substitute the opinion of the Court for the opinion of the condemning party upon that question or give the Court any power to overrule the corporation's discretion in determining the question of necessity where no abuse of power is shown. In short, the question of necessity is determined primarily by the condemning party and *the only power of the Court is to prevent an abuse of power by the corporation.*

Wheeling & Lake Erie R. R. Co. vs. Toledo Ry. & Ter. Co., 72 Ohio. St., 368, 384;
Bowersox vs. Watson, 20 Ohio St., 496, 507.

It is settled, too, that the statute means only a *reasonable* and *not* an *absolute* necessity.

Reusch vs. Northern Ohio Traction & Light Co., 19 Ohio C. C. (N. S.), 1, 8.

In the present case the necessity for the appropriation of the land here in question was determined in the first instance by the plaintiff in its resolution of June 4, 1908 (Record, pp. 35, 36). Upon the trial, one witness testified upon this subject as follows:

"Q. From your knowledge and familiarity with the plant and project of The Cuyahoga River Power Company are you able to state whether or not in the event that project is constructed and development made, the property described in the petition here is necessary to carry out the project? A. I am able to state so, yes, sir.

"Q. And is it necessary? A. Absolutely necessary. It could not be constructed without" (Record, p. 52).

Another witness testified on cross-examination by the defendants' counsel:

"Q. If a dam were built within the limits of the land described in the petition in this case and backed the water to the Village of Cuyahoga Falls or to a point within the limits of the Village of Cuyahoga Falls, and that dam

was 60 feet high and a hydro electric plant had been built a distance of 2,700 feet below it having a capacity of about 3,000 horse power, and a steam plant had been built within the limits of the land described in the petition with a capacity of 30,000 horse power or more, both using the water contained in the reservoir made by that dam, *would you say that the development proposed by the Cuyahoga River Power Company would be destructive of that use?* A. Yes" (Record, p. 241).

If the development proposed by the plaintiff would destroy the use of the land made by the defendants the necessity for appropriating the land necessarily follows.

Still a third witness testified with reference to the construction of the project of the plaintiff:

> "Q. Would it or would it not necessitate the taking of that property (*i. e.* the defendants' property)? A. It would."
> (Record, p. 246.)

All this testimony went in without objection and it was all given by witnesses whose qualifications to speak upon the subject were unquestioned. Nor is there a syllable in the record to contradict it. Nobody suggested in the State Court that the decision of the plaintiff to take a strip of 100 feet rather than a strip of 50 or of 200 feet was arbitrary; and there being no evidence whatever to impeach or contradict the judgment and opinion of the three expert engineers who testified for the plaintiff, their testimony cannot be overcome by the mere assertion of defendants' present counsel in their brief in this court. If there were any-

thing arbitrary about the plaintiff's determination to take a strip of this width it surely could have been brought out by cross-examination of the plaintiff's experts or by any one of several of the witnesses actually called by the defendants upon the trial. *The defendants made no attempt whatever either to contradict the evidence given by the plaintiff's witnesses or impugn the soundness of their views upon the question of necessity, which, after all, is largely an engineering question.* In short, as pointed out on pages 53 and 54 of our brief in opposition to motion to dismiss in this court, this question of necessity was not raised in the State court or in any way saved or preserved.

In addition to this, the defendants explicity admit in both of their briefs in this court that the construction of the plaintiff's improvement "will injure defendants' property because it will deprive defendants of the ordinary flow of the river" (Brief, p. 17); and that it "would cause damage to defendants for it would divert the ordinary flow of the river so that defendants would be deprived of their riparian rights" (Brief on Motion to Dismiss, p. 23. See also p. 54 of our Brief on Motion to Dismiss and quotations there set forth).

And the Supreme Court of Ohio has decided that riparian rights "constitute a part of the owner's estate in the land, and materially enter into its actual value; and that *any injurious invasion, or impairment of those rights, amounts to a taking of the owner's property.*"

Mansfield vs. Balliett, 65 Ohio St. 451, 470, 471.

In that case a city was held liable for damages because it had polluted a natural watercourse without acquiring the riparian rights of the owners along the stream by legal appropriation proceedings. Obviously, therefore, a construction of the plaintiff's plant would constitute a *taking* of the defendants' property, and because of this fact it is absolutely necessary under the decisions of Ohio for the plaintiff to appropriate the property in order to be able to go ahead with its undertaking.

Apparently the defendants' idea (put forward now in order to defeat this case but to be quickly abandoned when the time comes for assessing compensation) is that only a *flooding* of their land would constitute a taking and that as the plaintiff may only deprive the land of "the ordinary flow of the stream" no necessity for the appropriation exists (See their brief, pp. 17, 27). In answer to this it is sufficient to say that if, as held in *Mansfield vs. Balliett, supra,* a mere *pollution* makes an appropriation necessary, *a fortiori* or deprivation of the flow makes it necessary. But in addition to this, the evidence shows that no plant can be constructed that will not lose some water, and in times of flood it will be necessary to let the flood waters down over the land in question (See Rec., pp. 240-242). In short, the plaintiff must control the flow of the stream; and while at some times the land in question will be *deprived* of the ordinary flow at other times it will be subject to *overflow*. There is "no ground for the distinction attempted between the taking of rights below the contemplated dam, such as these are, and those above."

Mt. Vernon Cotton Co. vs. Alabama Power Co., 240 U. S., 30, 33.

The riparian right thus necessary to be destroyed (*i. e.*, taken) by the plaintiff "is not a mere easement or appurtenance, but exists by the law of nature as *an inseparable part of the land.*"

> *United States vs. Cress,* per Mr. Justice PITNEY, decided March 12, 1917 (not yet reported) paragraph (4) of opinion;
> *Mansfield vs. Balliett, supra.*

And as the plaintiff's plan "takes away the use and value" of the land it results that its plan "must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee."

> *United States vs. Lynah,* 188 U. S., 445, 470, quoted in
> *United States vs. Cress, supra,*

It may be mentioned in passing, too, that it is settled in Ohio that the statute authorizes the taking of a fee.

> *Pittsburgh & Western Ry. Co. vs. Garlick,* 20 Ohio Cir. Ct. 561, affirmed 66 Ohio St. 688.

At page 27 of the defendants' brief there is a suggestion that the statute does not authorize a "diversion" of water. But the statute expressly provides for the building of *dams* "to raise and maintain a head of water," the "constructing and maintaining" of *"canals, locks, and race-ways* to regulate and *carry* such head of water to any plant or power house where electricity is to be generated," the entry upon land for the purpose of ex-

amining and surveying "for a reservoir, dams, canals, race-ways, plant or power-house" and the appropriation of "so much thereof as is deemed necessary for the laying down or building of such tubing, *conduits, pipes, dams*, poles, wires, *reservoir, plant* and power house, as well as the land overflowed, and for the erection of *tanks and reservoirs* * * * and the erection of *such building as may be necessary for the purpose aforesaid.*"

Dams, reservoirs, canals, race-ways, conduits, and pipes all involve the idea of diversion, for each necessarily causes a diversion. Nor can the water of a stream be "carried" "to any plant or power house where electricity is to be generated" without diverting it from the stream. In short, the old fashioned mill-pond on one's own land (for which no statute was necessary) would be the maximum development possible without the right of diversion, and to say that the statute here in question does not give that right is to say that the Ohio legislature's attempt "to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared" and thus "supply what, next to intellect, is the very foundation of all our achievements and all our welfare"* is futile and abortive.

Reply to Defendants' Point V.

The contention advanced by the defendants in this point is that "Plaintiff's right to condemn is not a right entitled to the protection of the Federal Constitutional guarantees."

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*Mr. Justice HOLMES in *Mt. Vernon Cotton Co. vs. Alabama Power Co.*, 240 U. S. 30, 33.

The insincerity of the contention is manifested by the fact that at page 6 of their brief, in arguing that this right of the plaintiff "is distinctly a State right," the defendants make the diametrically opposite statement that

> "It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution."

The attempt to compare this right of the plaintiff to a liquor license or a license to practice medicine is unworthy of serious consideration. It is too late to argue that valuable privileges given by a charter which are essentially connected with the franchise and necessary to the business of the corporation and to the full enjoyment of the main object of the charter are not contract and property rights within the meaning of the Constitution. (See Point II of our original brief, and particularly pp. 32, 36, 37, 42 and 45).

To the cases there cited we add:

Davis vs. Gray, 16 Wall. 203, 228, per Mr. Justice SWAYNE:

> "The real estate of a corporation is a distinct thing from its franchises. But the right to acquire and sell real estate is a franchise, and the right to acquire the particular real estate designated in the charter of this company, and here in question, is within that category."

Morgan vs. Louisiana, 93 U. S. 217, 223, per Mr. Justice FIELD:

> "The franchises of a railroad corporation are rights or privileges which are essential to

> the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, *to appropriate earth and gravel for the bed of its road, or water for its engines, and the like.* They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

With reference to the comments made by the defendants at page 31 of their brief upon *Chesapeake & Ohio Canal Co. vs. Baltimore & Ohio R. R. Co.*, 4 Gill & Johns. 1, it is evident that counsel have not read the case. The discussion proceeded largely upon its constitutional aspect, and we direct particular attention to page 164 of the report of that case, where it is shown that the court was urged to *deny* rather than *sustain* the asserted Federal rights in order that the case might be brought here.

Under this point defendants make the statement that although the Traction Company did not take the legal title to the land in question until February, 1914, yet "the record shows very clearly that the property *has been owned* by The Northern Ohio Traction and Light Company ever since it was organized" and that "the defendants' ownership of the property therefore antedates plaintiff's incorporation and right to condemn property for its corporate purposes, and defendants' actual development of the property for its public use was begun before plaintiff commenced this condemnation suit." (Brief, p. 32).

The record shows nothing of the kind. The conveyance by Everett to the Realty Company was an

absolute conveyance in fee with the explicit statement that "neither the said grantor nor his heirs, nor any other persons claiming title through or under him shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred" (Record, p. 126). There is not a scintilla of evidence that either the Realty Company or the so-called Northern Ohio Power Company ever entered into any agreement to hold the land in trust for the Traction Company or that by any corporate act either of said companies ever assumed or acknowledged a trust relation with respect to it. The Traction Company's claim of ownership of the land is based purely and simply upon the fact that it *owned the stock* of these companies. Obviously such stock ownership did not make it the owner of the land.

Gibbons vs. Mahon, 136 U. S. 549, 557;
Humphreys vs. McKissock, 140 U. S. 304, 311, 312;
Saranac & L. P. R. Co. vs. Arnold, 167 N. Y. 368, 374;
Peterson vs. Chicago, R. I. & P. Ry. Co., 205 U. S., 364, 391, 393;
Conley vs. Mathieson Alkali Works, 190 U. S., 406, 409;
De La Vergne Co. vs. German Savings Institution, 175 U. S., 40, 53;
Harriman vs. Northern Securities Co., 197 U. S., 244, 297, 299;
Kardo Co. vs. Adams, 231 Fed., 950, 964, 970; per C. C. A., 6th Circuit, discussing corporate existence under Ohio Law.

In the case last cited it was said:

> "The theory of separate entity of a corporation is not disturbed by the ownership of all of its stock by another corporation. * * *
>
> "Even in cases in which all the stock of the corporation is owned by one person or another corporation, the corporate rights are distinct from the rights of stockholders. And when the cause of action relates to property and property rights, of which the corporation is vested with the legal title, the corporation is the real party in interest."

Of course corporate forms are sometimes disregarded by Courts of equity when this course is necessary to preserve the rights of innocent parties or circumvent fraud—when the corporate entity is used merely as a shield for fraudulent or other illegal acts.

> *In re Rieger, Kapner & Altmark*, 157 Fed., 609, 613, 614, D. C. S. D., Ohio, per Judge SATER;
>
> *Kardo Co. vs. Adams*, 231 Fed., 950, 966, 967;
>
> *State ex rel. vs. Standard Oil Co.*, 49 Ohio St., 137.

But no case has ever yet held that the corporation itself, or the stockholders who compose it, or any person who has been instrumental in bringing the corporation into being and holding it out to the public as a real entity, can, on an occasion when the corporate existence seems inimical to their own interests, ask the Court to disregard the corporate creation in order to defeat the rights of third parties.

> See 10 Cyc., 244, 249.

When the defendants discuss inability to agree they are very insistent upon the distinction between the corporation named The Northern Realty Company and the corporation named The Northern Ohio Traction and Light Company. They base the whole of their argument upon the existence of this distinction and press it to the extent of saying, in substance, that failure to agree with Christy as President of the Realty Company was not a failure to agree with Christy as Vice-President of the Traction Company. When they come to discuss the question of devotion to a public use they ask the Court to close its eyes to the various different corporations and the conveyances to and from them and say that they were not separate corporations but all one. This cannot be done. The Traction Company must lie in the bed it has made and accept the consequences of the indisputable fact that at the time of the commencement of this proceeding the land was owned by the Realty Company, a *mere private owner* which had not, and under its charter, could not, devote the land to any public use. Both the so-called Northern Ohio Power Company and the Traction Company stand in the position of purchasers *pendente lite* with actual and constructive notice of the plaintiff's rights; and as such they necessarily took subject to this pending proceeding.

Lewis, Eminent Domain, §537.

This rule, indeed, has been embodied in the statute of Ohio, for in §11300 of the Ohio General Code it is provided:

> "When the summons has been served or the publication made, the action is pending so as to charge third persons with notice of its

pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title."

This statute is in accord, too, with the established rule that a chose in action, the right to prosecute the suit to judgment, is itself property.

Pritchard vs. Norton, 106 U. S., 132;
Cincinnati vs. Louisville & Nashville R. R .Co., 223 U. S., 390-400.

The case of *Harriman vs. Northern Securities Co.*, 197 U. S. 244, already cited, is clear and controlling in showing that the Traction Company cannot here dispute the Realty Company's position as the absolute fee simple owner of the land or its own position as a mere stockholder in that company with no title to its assets. In that case Mr. Harriman participated in the organization of the Securities Company and conveyed to it certain of his shares of stock of the Northern Pacific Railway Company and became one of the stockholders of the Securities Company. The Securities Company was subsequently adjudged to be an illegal combination in restraint of trade. In the liquidation of its assets that then took place Mr. Harriman insisted upon receiving back the identical property he had conveyed, but this relief was denied, the court holding that he had parted with his title to his Northern Pacific shares by conveying them to the Securities Company and that consequently he stood merely in the position of an ordinary stockholder and must be content with the ratable proportion of its corporate assets. In like manner even if the Traction Company could be regarded as having been the equitable owner of the

land under the so-called "Everett Trust" (which was never recorded and hence unknown to the plaintiff and was "lost" by counsel on the very eve of the trial) it voluntarily and absolutely parted with its equitable interest when it caused Everett to convey the land to the Realty Company, and even though the Realty Company and the so-called Northern Ohio Power Company were both mere "dummies" and frauds and shams and the grossest sorts of illegalities, the Realty Company's ownership of the land, unaffected by any trust or interest in the Traction Company, was placed beyond dispute on the part of the Traction Company by its conduct in having the land conveyed to it (see particularly page 297 of 197 U. S.).

Furthermore, even though the Traction Company should succeed in its attempt to have this court disregard, in its own interest, the corporate creations and conveyances which it has procured, its position in this case would not be improved. *Its mere ownership of the land does not show that it was devoted to a public use.*

It is true that a report on water power was obtained by the Akron, Bedford & Cleveland Railroad back in 1897, but *nothing was ever done with the report. It was never acted upon,* and the record may be searched in vain for a single corporate act that manifests in the slightest degree any intent whatever to devote the property to water power uses until long after the plaintiff's charter was obtained. In 1906, 1907 and 1908 officials of the Traction Company negotiated for the sale of the property (Record, pp. 228, 230). In December, 1910, they caused the land to be conveyed to a real

estate company. These negotiations disclose an absence of any fixed purpose or existing intent, and this conveyance affirmatively manifests an intent *not* to devote the property to a public use. It was not until January 31, 1911, when the property was conveyed to the so-called Northern Ohio Power Company, that there is the slightest indication of a real intent to devote the land to power house uses. True, the Traction Company sent an engineer onto the land and did some grubbing or clearing for the foundation of the steam power plant in December, 1910 (Record, pp. 77, 78). But this was done in the name of the so-called Northern Ohio Power Company (Record, p. 78), and was at most the preliminary work of promoters which took effect only when the land came under control of the Power Company.

Thus, even if the Traction Company were "the owner" it held the land as a *mere individual proprietor* and it was as much subject to appropriation by the plaintiff under the Traction Company's ownership as if it had been owned by an individual.

Oregon Washington R. & N. Co. vs. Wilkinson, 188 Fed., 363, to which we call particular attention on account of the similarity of facts;

Colorado E. Ry. Co. vs. Union Pac. Ry. Co., 41 Fed., 293;

Matter of Rochester Water Commissioners, 66 N. Y., 413, 418;

Lewis, Eminent Domain, §§420, 442, 443;

Railroad Co. vs. Village of Belle Centre, 48 Ohio St., 273.

In the case last cited it was held that land owned by a railroad company but not in use for railroad purposes might be taken.

See, also, the other authorities cited at pages 102-107 of our original brief, which clearly show that mere ownership of property, even by a corporation having the power of eminent domain, does not constitute a devotion of the land to a public use or prevent it from being appropriated by another corporation.

Reply to Defendants' Point VI.

Under this point the defendants contend that whether or not the Traction Company had the power of eminent domain for the appropriation of land for power houses is "a question of interpretation of a State statute," that "the State court has passed upon this question adversely to the contention of plaintiff," and (by way of suggestion) this Court will follow the State court even though the question resolve itself into one with reference to the character of the use, whether public or private.

The argument proceeds upon false premises.

The question as to whether the use set up in the record for the purpose of defeating the plaintiff's right to acquire the land is public or private has nothing to do with the Traction Company's power of eminent domain. The alleged devotion was not made by the Traction Company but by its "dummy," the so-called Northern Ohio Power Company, and the use of this "dummy" is private for the reasons stated at pages 55 to 69 of our original brief.

And in the language used by the Court of Appeals in ousting of its franchises another "dummy" of this very Traction Company:

> "It is no answer to say that The Northern Ohio could legally have built this new line without the use of a dummy. For the question is not what The Northern Ohio could or could not do, but what the defendant did do."
>
> Original Brief, p. 62.
> Appendix, p. 51.

We do not deny but insist upon the rule that upon the question of public and private use this Court will pay very great respect to "the deliberate judgment and matured thought of the State Courts," and we ask this Court to reverse the judgment under review for the very reason that it is a sporadic decision in direct conflict with the local policy as settled by many decisions of the State Supreme Court (see page 60 of our original brief). The defendants, for obvious reasons, carefully avoid any reference to these decisions.

There is a like failure on the part of the defendants to make any answer to Point VII of our original brief wherein it is set up that the plaintiff has a right to acquire the land despite the defendants present possession and use of it even though that use be a public one. The defendants' sole comment upon this point is:

> "This, again, is a question where this court will follow the decision of the State court" (Brief, p. 35).

But it is well settled that this Court will construe the plaintiff's contract for itself upon its own

independent judgment, and that in making such construction the Court will treat the contract as if there were embodied in its text the settled rule of law which existed in the State at the time the contract was made (pages 98-100 of our original brief).

When the contract is thus construed it is very plain that the land was not withdrawn from the plaintiff's right to acquire it; AND TO THE END THAT THE CONTRACT MAY BE ENFORCED AND PROTECTED, AND NOT IMPAIRED, THE JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

May, 1917.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 342.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

APPENDIX TO BRIEF FOR PLAINTIFF-IN-ERROR.

(Containing Statutes, &c., Referred to in Brief)

WILLIAM Z. DAVIS, Columbus, Ohio.
JOHN L. WELLS, CARROLL G. WALTER, New York.
Counsel for Plaintiff-in-Error.

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CONSTITUTION OF OHIO.

ARTICLE I.

Bill of Rights.

Of the Inviolability of Private Property.

Section 19. Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

ARTICLE II.

Legislative.

In Whom Legislative Power is Vested. Initiative and Referendum.

Section 1. The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the

general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws.

ARTICLE XIII.

Corporations.

Right of Way.

Section 5. No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law.

Ohio General Code of 1910.

Part Second—Civil.

Title IX. Private Corporations.

Division I. General Provisions.

Chapter 1. Organization and Powers.

Articles of Incorporation.

Section 8625. Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

1. The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth:

a. The kind of improvement intended to be constructed.

b. Its termini, and the counties in or through which it or its branches will pass. (R. S., Secs. 3236, 3237.)

Acknowledgment of Articles; Where Filed.

Section 8626. Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgment of deeds, the form of which shall be prescribed by the secretary of state. The

official character of the officer before whom articles of incorporation are acknowledged, shall be certified by the clerk of the common pleas court of the county wherein the acknowledgment is taken. Articles of incorporation shall be filed in the office of the secretary of state, who shall record them, and shall also record certificates relating to that corporation, thereafter filed in his office. (R. S., Secs. 3236, 3238.)

General Powers.

Section 8627. Upon filing articles of incorporation, the persons who subscribed them, their associates, successors, and assigns, by the name and style provided therein, shall be a body corporate, with succession, power to sue and be sued, contract and be contracted with; also, unless specially limited, to acquire and hold all property, real or personal, necessary to effect the object for which it is created, and at pleasure convey it in conformity with its regulations and the laws of this state. Such corporation also may make, use, and at will alter a common seal, and do all other acts needful to accomplish the purposes of its organization. (R. S., Sec. 3239.)

Division II. Public Service Corporations.

Subdivision I. Railroads.

Chapter I. Special Powers.

Construction.

Six Main Tracks.

Section 8745. Any railroad company may maintain and operate, or construct, maintain and

operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road.

Appropriation of Land; Entry Upon for Examination and Survey.

Section 8759. A company or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad including necessary side-tracks, depots, work-shops, round-houses, and water-stations, material for construction, except timber, a right of way over adjacent lands sufficient to enable it to construct and repair its road and the right to conduct water by aqueducts and to make proper drains. (R. S., Sec. 3281.)

Chapter 10. Street and Interurban.

Appropriation of Property By Directors.

Section 9115. When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend

its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and subject to the provisions of law for the appropriation of private property by corporations. (97 v. 106 §1.)

Appropriation of Property.

Section 9119. Street, interurban or suburban railroads using other than steam as a motive power, when necessary may enter upon and use private property in the construction, alteration and operation of its road or any part thereof and for such purposes shall have all of the rights and powers of appropriation, outside of municipalities, that steam railroad companies possess.

Division VII. Miscellaneous.

Chapter 1. Provisions Relating to Certain Corporations.

Hydraulic.

Construction of Dams, Pipe Lines, etc.

Section 10128. Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and maintaining canals, locks, and raceways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables

to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, raceways, plant or power-house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power-house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purposes aforesaid. (R. S., Sec. 3878.)

How Right Acquired.

Section 10129. Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of

the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. (R. S., Sec. 3878.)

Right to Appropriate Public Way, How Acquired.

Section 10130. Nothing in the two preceding sections shall be construed to confer power to appropriate any portion of any street, alley, highway, or other public way or land, or to confer any right in any street, alley, highway or other public way or land situated within any municipality, without its consent. (R. S., Sec. 3878.)

Reservoirs in Certain Places Prohibited.

Section 10131. No reservoirs for the storage or transportation of water shall be constructed within the corporate limits of any municipal corporation or any public park, and all excavations, except reservoirs for storage and transportation of water, shall be well filled by such company, and so kept by it. (R. S., Sec. 3878.)

Common-carrier.

Section 10132. Such company or companies, for the purpose of transporting natural gas, oils, water, and electricity shall be a common carrier, and subject to all the duties and liabilities of such carriers under the laws of this state. (R. S., Sec. 3878.)

May Hold Certain Property.

Section 10133. Such a company may take, by purchase or otherwise, and hold, such real and per-

sonal estate, and erect or purchase the necessary buildings and machinery for carrying on the business, including all the necessary equipments and appendages of the business, such as tubing, pumps, tanks, telegraph apparatus, and engines, as may be necessary to transport oils and water through tubes and pipes. (R. S., Sec. 3879.)

Further Powers of Such Companies.

Section 10134. Such a company may transport, store, insure and ship natural gas, petroleum or water, and transport and store water, for the purpose of furnishing it to engineers employed in developing for, or in the production and transportation of petroleum, and for that purpose it may lay down, construct and maintain the necessary pipes, tubing, tanks, machinery and arrangements. (R. S., Sec. 3880.)

Part Third—Remedial.

Title III. Procedure in Probate Court.

Chapter 1. Jurisdiction.

Exclusive Jurisdiction.

Section 10492. Except as hereinafter provided, the probate court shall have exclusive jurisdiction:
* * *

7. To make inquests of the amount of compensation to be made to the owners of real estate when appropriated by any corporation legally authorized to make such appropriation.

Chapter 5. Appropriation of Property.

Appropriation of Private Property.

Section 11038. Appropriation of private property by corporations must be made according to the provisions of this Chapter. (R. S., 6414.)

When Appropriations Made.

Section 11039. Appropriations can be made only when the corporation is unable to agree with the owner, or his guardian or trustee, as to the compensation to be paid for the property, or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown. (R. S., Sec. 6415.)

Appropriation of Property of Minor, Idiot, Imbecile or Insane Person.

Section 11040. Under this chapter, when the property of a minor, idiot, imbecile, or insane person, or any easement or interest therein, is sought to be appropriated by a corporation and there is a legally appointed guardian of the person and estate or of the estates, or a trustee of such minor, idiot, imbecile, or insane person, and the guardian has agreed with the corporation upon the amount of compensation to be paid for such property, easement, or interest therein, he may file with the probate court of the county wherein the property is situated, a written application for authority to convey the property or interest to such corporation. The application must fully describe the property,

right, easement or interest therein, sought to be conveyed, and set out the price agreed to be paid for it. (R. S., Sec. 6415a.)

Notice to Ward.

Section 11041. The probate judge shall order the guardian to give such notice as he deems reasonable, to the ward, of the filing of the application, and of the time set for its hearing. At the time for the hearing, if the judge finds that notice was given as ordered of the time set therefor, that the price to be paid is just, and that such conveyance will be to the best interest of his ward, he shall order the guardian to make and execute a deed to the corporation for the property or interests upon the payment of the price agreed upon by them. (R. S., Sec. 6415a.)

Petition for Appropriation.

Section 11042. In such a case the corporation may file a petition with the probate judge, verified as in a civil action, containing a specific description of each parcel of property, interest, or right, within the county, sought to be appropriated, the work, if any, intended to be constructed thereon, the use to which the property is to be applied, the necessity for the appropriation, the name of the owner of each parcel, if known, or if not known, a statement of that fact, the names of all persons having or claiming an interest, legal or equitable, in the property, so far as they can be ascertained, and a prayer for its appropriation. (R. S., Sec. 6416.)

The County Petition to be Filed in.

Section 11043. The petition may include one or more of the parcels of property, rights, or interests

in the county in which it is filed. When any such parcel, right or interest, is situated in two or more counties, the petition may be filed in either of the counties in which an owner is resident, and if no owner resides therein, it may be filed in either. (R. S., Sec. 6417.)

Summons.

Section 11044. Upon the filing of the precipe therefor, the probate judge shall issue summons for the owners, and persons named in the petition as residents of the state, having an interest, which may be directed to the sheriff of any county, and shall command him to notify the persons it names of the filing of the petition, and to appear thereto at a time to be fixed by the judge, and therein stated, not less than five nor more than fifteen days from the date thereof. It must be served and returned as in a civil action. When returned "not summoned," other writs may issue until the parties are duly summoned. (R. S., Sec. 6418.)

Service by Publication.

Section 11045. When a person having an interest is unknown, or his residence is beyond the state or unknown, the corporation may make service against him by publishing in a newspaper of general circulation in the county where the petition is filed, for four consecutive weeks, and notice containing a summary statement of the object and prayer of the petition, so far as it relates to the property of the person thus to be notified, the court in which it is filed, and the time when such person is to appear thereto, not less than ten nor more than twenty days after the last publication. The

fact of publication may be proved by the affidavit of any person having knowledge thereof. (R. S., Sec. 6419.)

Jurisdictional Questions.

Section 11046. On the day named in a summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon all these questions the burden of proof shall be upon the corporation, and any interested person shall be heard. (R. S., Sec. 6420.)

Jurors.

Section 11047. If, as to any or all of the property, and persons interested therein, the judge determines such questions for the corporation, he shall issue an order to the clerk and sheriff to draw sixteen names from the jury wheel, as in other cases, and within two days after the receipt of it they must execute the order, and the clerk forthwith return it to the probate judge, with a list of the names drawn endorsed thereon, who shall issue to the sheriff a venire for the jurors so drawn to attend at his office at a time to be fixed by him, and named in the writ, not exceeding ten days from the date thereof. It shall be served and returned as in other cases. (R. S., Sec. 6421.)

Who Entitled to a Separate Trial and Conduct of Trial.

Section 11048. The owners of each separate parcel, right, or interest, are entitled to a separate

trial by jury, verdict, and judgment. They shall hold the affirmative on the trial, which must be conducted, evidence admitted and bills of exception allowed as provided in civil actions. (R. S., Sec. 6422.)

Amendments.

Section 11049. The Court may amend any defect or informality in the proceedings authorized or required by this chapter or cause new parties to be added, and direct such further notice to be given to a party in interest as it deems proper. (R. S., Sec. 6423.)

Time of Trial. Adjournments, and Discharge of Jurors.

Section 11050. The Court may direct the order and fix the time of the several trials, and adjourn or continue a trial for the purpose of obtaining proper service upon a property owner; or, when deemed necessary for the proper and convenient trial of the several cases, it may discharge a jury, and cause other juries to be impaneled, as provided in this chapter. (R. S., Sec. 6424.)

How Panel Filled.

Section 11051. If, by reason of non-attendance, sickness, or other cause, any of the sixteen persons are not present and in condition to serve as jurors, the judge shall order the sheriff to fill the vacancies with talesmen. When the list of sixteen is full, the judge shall call upon each separately, beginning with the first named on the list, to take his place in the jury box, and personally inquire of each, as called, whether he is interested in any way in any of the property, rights or interests

sought to be appropriated, or in the corporation which filed the petition, either as owner, stockholder, agent, attorney, or otherwise. If such person answers in the affirmative, or if it be shown to the judge, by satisfactory evidence, that he is so interested, he shall be excused from serving on the jury, and the next person on the list be called, and interrogated in like manner. If the list of sixteen be exhausted before a proper jury of twelve men is taken and accepted therefrom, the judge shall order the sheriff to fill the remaining vacancies in the jury box required to make up the number of twelve with talesmen, who shall be interrogated as above provided. (R. S., Sec. 6425.)

Peremptory Challenges.

Section 11052. When a jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner, shall each have the right to four peremptory challenges, and to challenge for cause. Vacancies arising in the jury from challenge, or otherwise, shall be filled with talesmen having the qualifications prescribed in the next preceding section, to be ascertained as therein provided. (R. S., Sec. 6426.)

Oath of Jury.

Section 11053. When a jury is filled, the probate judge shall administer to them the following oath: "You, and each of you, do solemnly swear that, according to your best judgment, you will justly and impartially assess the amount of compensation due to the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their prop-

erty described in the petition, to the use of (here name the corporation) in the proceedings now pending, irrespective of any benefit from any improvement proposed by such corporation; and you do further swear that in assessing any damages that may occur to such property owners, by reason of the appropriation, other than the compensation, you will further ascertain how much less valuable the remaining portion of such property will be in consequence of such appropriation. This you swear as you shall answer to God." (R. S., Sec. 6427.)

The Form of Writ to Sheriff.

Section 11054. Upon motion of either party, the probate judge may issue the following writ to the sheriff, to-wit: "To the sheriff of County: You are hereby commanded to conduct the twelve jurors namel in the panel to this writ annexed, to view the property or premises sought to be appropriated by (here state the name of the corporation), and owned by (here state the name of each owner), on , the day of , then and there to view the premises or property aforesaid, in the presence of A and B on the part of the corporation aforesaid, and C and D on the part of the owner, appointed by this court, and you will make return of the manner you have executed this writ to this court, on the day of , A. D., ." The writ shall be signed by the probate judge and certified under his seal of office. (R. S., Sec. 6428.)

Judge Must Deliver Certain Copies to Sheriff.

Section 11055. The judge also shall deliver to the sheriff a copy of that part of the petition con-

taining a separate description of each parcel of property, and rights or interests sought to be appropriated within the county, which the jury is required to view. He may appoint, to be present at the view, the two persons named in the writ. The sheriff who is to execute the writ, by a special return upon it, shall certify under his hand that the view has been made according to the command thereof. The expenses of the view must be taxed in the bill of costs. No evidence shall be given on either side at its taking. (R. S., Sec. 6429.)

Witnesses Examined Before Jury.

Section 11056. Witnesses may be examined before the jury after its return to the court. If more than three witnesses be examined by either party, on the same point in the same case, the judge may tax the costs of such additional witnesses to the party calling them. (R. S., Sec. 6430.)

When a Structure is Partly on Land to be Appropriated.

Section 11057. When a building or other structure is situated partly upon land sought to be appropriated, and partly upon adjoining land, and such structure cannot be divided upon the line between such two tracts without manifest injury, in assessing the compensation to any owner of the lands, the jury shall assess its value exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain its ownership, and to remove it, or accept the value estimated by the jury. If he fails to make such election within ten days from the date of the jury's report, or within ten days from the termination of the cause in a higher

court to which it is taken, he shall be deemed to have elected to retain and remove the structure. If he elects to accept the value of the structure, the title thereto shall vest in the corporation making the appropriation, with the right to enter upon the land for the purpose of removing it therefrom. (R. S., Sec. 6431.)

Verdict.

Section 11058. The jury shall render its verdict in writing, signed by the foreman, to the judge, who shall cause it to be entered of record. Unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict. (R. S., Sec. 6432.)

When and How Corporation May Have Possession.

Section 11059. Upon payment to the party entitled thereto, or deposit with the probate judge of the amount of the verdict and such costs as lawfully accrued in the case up to the time against the corporation, it will be entitled to take possession of, and hold, the property, rights or interests so appropriated, for the uses and purposes for which the appropriation was sought, as set forth in the petition. The judge shall enter of record an order to that effect, and if necessary, proper process shall be issued to place the corporation in possession thereof. (R. S., Sec. 6433.)

When and How Corporation May Abandon Proceeding.

Section 11060. The corporation may abandon any case or proceeding after paying into court the amount of the defendant's costs, expenses, and at-

torney fees, as found by the court. If the corporation fails in any case to make payment or deposit, as provided in the next preceding section, within thirty days after confirmation of the verdict, on motion of the party entitled to such payment, to be filed within ten days after the expiration of such thirty days, the judge shall enter an order directing the corporation to make such payment or deposit within thirty days after the date of the order. Unless such corporation, within such time makes such payment or deposit, it shall be held thereby to have abandoned the property, rights, or interests so appropriated, and all claims thereon under its proceeding, and the judge shall issue an order to that effect. He also shall enter a judgment against the corporation, and in favor of the party entitled to such payment, for such amount of expenses, including time spent and attorney fees incurred by him in the proceeding, as, upon the evidence offered in that behalf, the court deems just, for which execution may be issued against the corporation. The directors of the corporation, shall be individually liable upon such judgment, and may be made parties thereto by action. (R. S., Sec. 6434.)

Action for Costs and Expenses.

Section 11061. If such judgment is not satisfied within thirty days after its rendition, or if the party entitled thereto is not satisfied with its amount he shall have a right of action against the petitioner for such expenses, including time spent and attorney fees, and also for his expenses, including reasonable attorney fees, incurred in prosecuting such action. But it must be brought within

six months after the rendition of the judgment in the probate court. (R. S., Sec. 6435.)

New Trial, Proceedings Thereon.

Section 11062. A new trial shall be granted for cause only, shall take place in the court where the first trial was had, and be conducted in accordance with the provisions of this chapter so far as they are applicable. Upon granting the motion for a new trial, if the amount of the first verdict has been paid into court the judge shall retain it until the final termination of the second trial. On the new trial, if the verdict of the jury exceeds the amount of the first verdict, the corporation must pay the amount of the first verdict, together with the excess, to the owner of the property. When the verdict upon the second trial is less than that of the first, the judge shall repay to the corporation the difference. If a new trial be granted at the instance of the owner of the property, and the verdict of the jury be the same or less in amount than that first rendered, he must pay all the costs of the second trial. If it be more than that first rendered, the costs of the second trial must be paid by the corporation. (R. S., Sec. 6436.)

Bills of Exceptions.

Section 11063. Bills of exceptions may be taken and shall be allowed, as provided by law in civil actions. (R. S., Sec. 6437.)

Petition in Error.

Section 11064. Either party may file a petition in error in the court of common pleas of the proper county within thirty days after the time allowed

for such signing of bills of exceptions, and the proceedings in error shall be conducted as in civil cases. (R. S., Sec. 6437.)

Corporation May Pay Judgment and Enter on Property.

Section 11065. On the rendition of final judgment in the probate court, the corporation may pay into the court the amount of the judgment for compensation, and costs therein rendered, and proceed to enter upon and appropriate property notwithstanding the pendency of the proceedings in error. (R. S., Sec. 6437.)

Proceedings in the Common Pleas on Error.

Section 11066. Upon the hearing of the cause, if the common pleas court affirms the judgment of the probate court, all the costs in the common pleas court shall be paid by the plaintiff in error. If it reverses such judgment, it shall retain the cause for trial and final judgment, as in other cases. The trial shall be had at the term of reversal, unless for good cause shown by either party a continuance is granted. On the trial of the cause in the common pleas court the same inquiry shall be made as to the interest of the jurors, and the same oath administered to the jury as hereinbefore provided. (R. S., Sec. 6438.)

How School Land Appropriated.

Section 11067. When a railroad company, incorporated in this state, has located its railroad through a part of reserved section twenty-nine or sixteen, or through a part of sections granted by congress instead of section sixteen for school pur-

poses, and such lands remain unsold, or through a town lot or parcels of ground used for or devoted to school purposes, it may appropriate so much of such land or lots as is necessary for its purposes. Service of the summons made on such trustees or school officers, as have possession or control of the lands, shall have the same force and effect as service in other cases on owners of land sought to be appropriated. The money arising from such appropriation must be disposed of by such trustees or school officers in accordance with law. (R. S., Sec. 6439.)

When Proceedings to Appropriate be Commenced in Common Pleas.

Section 11068. When the probate judge is interested, either as stockholder, director or otherwise, in a corporation seeking to appropriate private property to its use, or if before filing the petition, it is made to appear to the satisfaction of a judge of the common pleas court of the county wherein the action is to be brought, that such probate judge is interested either as owner or otherwise in the property sought to be appropriated, or by reason of sickness, absence or other incapacity is and will be unable to preside at the trial, the proceedings authorized by this chapter may be commenced in the common pleas court of the county. (R. S., Sec. 6440.)

Procedure in Common Pleas Court.

Section 11069. In such case, so far as applicable, the proceedings shall conform to the provisions of this chapter, and the powers conferred and duties imposed thereby upon the probate court devolve

upon the common pleas, which court may make such orders and direct such proceedings to be had as are necessary to do justice between the parties according to the spirit and intent of this chapter. (R. S., Sec. 6440.)

When Corporations Entitled to Possession.

Section 11070. After final judgment, on depositing the amount of the judgment and costs assessed in such court with the clerk thereof, the corporation may be entitled to enter into possession of the property sought to be appropriated. In case such court is not in session when the proceedings are begun therein, nor on the day fixed for the inquiry and assessment of compensation, a special term thereof must be held as provided by law. (R. S., Sec. 6440.)

When Court to Appoint Attorney.

Section 11071. When a party in interest is unknown, or his residence is unknown, and service has been made by publication, and the party has not appeared in the proceedings by agent or attorney, or when such party in interest is under any legal disability and has no legal guardian, or trustee, within the county where the action is brought, the court shall appoint some competent attorney to attend upon the proceedings, and protect the rights and interests of such party, and also fix the fees of the attorney for such service, which will be payable out of any money paid on the judgment rendered in such case for property appropriated. (R. S., Sec. 6441.)

Conflicting Claims.

Section 11072. When there are diverse or conflicting claims, legal or equitable, to the real estate, or any interest therein, sought to be appropriated under the provisions of this chapter, the jury or court shall not pass upon them in the proceedings for appropriation. Such claims shall be reserved for adjudication as hereinafter provided. (R. S., Sec. 6442.)

To be Adjudicated in the Common Pleas.

Section 11073. Upon the payment of the money into court by the corporation, a party claiming a legal or equitable interest in the property, or the money arising therefrom by such appropriation, may file his petition in the common pleas court of the proper county, making the other claimants to the property or money parties thereto, setting forth the facts on which the claim is founded, the fact of the appropriation of the property, the amount of money so paid in and such other facts as are required to enable the court to hear and determine the matter between the claimants. (R. S., Sec. 6443.)

Custody of Funds.

Section 11074. The court forthwith shall appoint some master, or other suitable person selected by the parties, to hold such fund, or invest it in the manner the court directs, after hearing the parties. Such fund thenceforth will represent the land, and the interests therein, and be subject to the control of the court having jurisdiction of the case, by orders entered in this action, according to the rights of the parties to the land or fund, as from time to time it determines. (R. S., Sec. 6443.)

Such Proceeding a Civil Action.

Section 11075. Such proceeding in the court of common pleas, shall be a civil action; and the conflicting claims of parties to such fund shall be determined by the court, or by a jury trial, according as the claim is equitable or legal, as if the land had not been converted into money. (R. S., Sec. 6444.)

Condemnation of Unfinished Road Bed.

Section 11076. A railroad corporation of this state may condemn and appropriate to its own use the interest and easement in and quiet title to any unfinished roadbed, or part thereof, lying within the state, and on the line of its proposed road, owned or claimed by another railroad company or companies, person or persons, partnership or corporation, when such roadbed, or part thereof, has remained in an unfinished condition, and without having the ties and iron placed and continued thereon for the period of five years or more, immediately preceding the commencement of proceedings to condemn or appropriate it as herein authorized. Every such company, or companies, person or persons, partnership or corporation shall be made a party defendant to such proceedings to condemn or appropriate it, and be required to answer therein, setting forth fully its or their title to or interest in such roadbed, or part thereof, so sought to be appropriated, if any, it or they claim, to which answer the plaintiff must plead issuably, unless it admits the validity of the defendant's claim. In such case, if a party defendant be a non-resident of this state, or a foreign corporation, service of summons may be made by publication, as in other proceedings to

appropriate the property of foreign corporations, or persons not residing in Ohio. (R. S., Sec. 6445.)

Construction of Terms.

Section 11077. The terms "company or companies" used in this chapter, also embrace "person or persons," "partnership or corporation" as used in the next preceding section. (R. S., Sec. 6445.)

Proceedings.

Section 11078. When it is determined by the court, upon issue of law, or by the jury upon issue of fact, or by the admission of the pleadings, or by reason of failure to plead that any company asserting such ownership or claim is not entitled thereto, judgment, including costs, must be rendered accordingly. But when in like manner it is determined that such a company has an interest in such roadbed, or part thereof, so sought to be appropriated, the jury shall determine and state the amount of compensation due to such company, according to law, on account of the appropriation of such interest. (R. S., Sec. 6446.)

Where Action to be Begun.

Section 11079. Such proceedings may be commenced in the probate court, the common pleas or the superior court of any county in which such roadbed, or part so sought to be appropriated or condemned is situated. All or part only of such roadbed within this state may be included in one proceeding, and when it is begun in the common pleas or superior court, the same proceedings shall be had as are prescribed in this chapter for its conduct in the probate court, so far as applicable and

not excepted in this action. On motion, the case shall be taken out of its order by the court or by a reviewing court, and determined without unnecessary delay. The provisions of this chapter as to viewers shall not apply to appropriations of roadbeds as herein authorized. (R. S., Sec. 6447.)

Error.

Section 11080. Proceedings in error to such common pleas or superior courts, may be commenced directly in the supreme court. (R. S., Sec. 6447.)

Statement of Intention.

Section 11081. When a railroad corporation commences proceedings under Section 11076, its president shall make, subscribe and file in the court where such proceeding is had a statement under oath, declaring that it is the bona fide intention of such corporation to complete and operate a railroad on the roadbed so sought to be appropriated. (R. S. Sec. 6447.)

Failure to Occupy Roadbed for One Year.

Section 11082. For a period of one year after it acquired right to occupy the roadbed, if such corporation fails to expend in and about the completion of a railroad thereon a sum equal to twenty-five per cent. of the total cost of completing it, to be estimated by a railroad commission of Ohio, then such roadbed will be open to appropriation and condemnation by any other railroad corporation. (R. S., Sec., 6447.)

Interpretation of Word "Roadbed."

Section 11083. The word "roadbed" used in any of the preceding sections includes rights of way, depot grounds, and other easements connected

therewith, and it will be sufficient in the petition and proceedings under this chapter to designate the roadbed as the roadbed of the railroad corporation by which the route of the road was located and established with the terminal points within which appropriation is sought. (R. S., Sec. 6447.)

Proceedings When Land is Held Without Agreement.

Section 11084. When a corporation, authorized by law to make appropriation of private property or lands reserved for school purposes, has taken possession of and is occupying or using the land of any person, or such school lands for any purpose, and the land so occupied or used has not been appropriated and paid for by the corporation, or is not held by an agreement in writing with the owner thereof, or the trustees or school officers having possession or control of such school lands, such owner or owners, or either of them, or such trustees or school officers, may serve written notice upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands. On the failure of such corporation for ten days so to proceed, the owner or owners or such trustees or school officers may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, and in cases of reserved sections sixteen and twenty-nine, or any part of sections granted by congress instead of section sixteen for school purposes, no right, legal or equitable, derived from the trustees and officers named therein, that such notice has been duly

served, that the time of limitation under the notice has elapsed, and such other facts, including a pertinent description of the land so used or occupied, as are proper to a full understanding of the case. (R. S., Sec. 6448.)

Demand of Written Statement Describing the Land Occupied Without Appropriation.

Section 11085. Such owner or owners, or such trustees or school officers, intending to institute such proceeding, may demand, in writing, from the president or chief officer of such corporation a specific description of each parcel of land so used or occupied without appropriation by it, of the work, if any, constructed or intended to be constructed thereon, and the use to which it is to be applied. Upon failure of the corporation for ten days to furnish this as fully as would be required of it in a proceeding to appropriate lands, the fact of such demand and failure may be alleged in the petition in such proceeding. On notice to the corporation and proof thereof to the probate judge having jurisdiction of such appropriation, he shall restrain it from the use and occupation of the land until such demand is complied with. Or, such owner or owners, or trustees or school officers may cause the necessary surveys to be made therefor, and the costs thereof must be taxed to the corporation in such proceeding. (R. S., Sec. 6448.)

Summons.

Section 11086. A summons shall issue and be served upon the corporation, and thereafter the proceedings in such court be conducted to final judgment as provided in this chapter. (R. S., Sec. 6449.)

Judgment and Execution.

Section 11087. If the corporation fails to pay the judgment and costs awarded against it in the proceeding, they may be collected by execution as in other cases. This section and the next preceding section shall not impair or lessen the right the owner or owners or the trustees or school officers may have to proceed against the corporation as in other cases of the unlawful entry upon lands. (R. S., Sec. 6449.)

Injunction May Issue Against Corporation.

Section 11088. If execution issued as provided in the next preceding section be returned unsatisfied, in whole or in part, with the endorsement that no goods, chattels, lands or tenements, can be found whereon to levy, or if the judgment remains unsatisfied for more than sixty days from its rendition, the court, by injunction, may restrain the corporation from using or occupying the lands until the judgment and costs are paid. (R. S., Sec. 6450.)

Fees.

Section 11089. The jurors summoned, and attending or serving, in accordance with the provisions of this chapter, shall be paid the same fees per day as jurors in the court of common pleas, and also five cents per mile for each mile of the distance they travel in the discharge of their duties. Witnesses must be allowed the same fees and mileage as for attendance at the court of common pleas. The sheriff shall be entitled to such fees as he is allowed by law for similar services in other cases, but not

anything in the way of poundage, except on money made on execution. The clerk shall be entitled to a fee of one dollar and fifty cents for drawing, and certifying to the probate judge, the list of jurors. The probate judge shall be allowed to enter a charge of five dollars in the cost bill for each day occupied in the trial of a cause, in addition to his other fees provided by law. The whole costs so taxed must be adjudged against and paid by the corporation, except as provided in the next following section. (R. S., Sec. 6451.)

When Costs Apportioned.

Section 11090. A corporation, by its proper officer, agent, or attorney, at the time of filing the petition with the probate judge, may deposit with him such sum of money, for each separate parcel of property as it deems a just compensation for the property, rights, and interests described in the petition, and sought to be apportioned. If the final verdict of the jury as to any parcel of property does not exceed the amount so deposited, and the owner has refused, after notice of such deposit, to accept it, the whole costs of the proceeding as to such parcel shall be equally divided between the corporation and the owner or owners of the property. When the final verdict as to any parcel or parcels exceeds, and as to other parcel or parcels does not exceed, the amount deposited, the probate judge shall apportion the costs in such manner as he deems just. (R. S., Sec. 6452.)

When This Chapter Does Not Apply.

Section 11091. The provisions of this chapter shall not apply to proceedings by state, county, township, district, or municipal authorities, to appropriate private property for public uses, or for roads or ditches. In all such cases it shall be op-

tional with such authorities to pay the judgment rendered against them, or to pay the costs and decline to take the property sought to be appropriated. (R. S., Sec. 6453.)

Ohio Public Service Commission Act,

Effective June 30, 1911.

(102 Ohio Laws, 549-575.)

Name. Additional Powers, Duties and Jurisdiction Imposed and Conferred.

Section 2. The railroad commission of Ohio shall hereafter be known as the public service commission of Ohio. In addition to the powers, duties, and jurisdiction conferred and imposed upon said commission by chapter one, division two, title three, part first, of the General Code, and the acts mandatory or supplementary thereto, the public service commission of Ohio shall have and exercise the powers, duties, and jurisdiction provided for in this act.

Definitions.

Section 3. The following words and phrases used in this act, unless the same be inconsistent with the text shall be construed as follows:

* * * * * * * * *

Any person or persons, firm or firms, copartnership or voluntary association, joint stock association, company or corporation, wherever organized or incorporated:

* * * * * * * * *

When engaged in the business of supplying electricity for light, heat or power purposes to consumers within this state, is an electric light company.

* * * * * * * * *

When engaged in the business of operating, as a common carrier, a railroad, wholly or partly within this state, with one or more tracks upon, along, above or below any public road, street, alley, way or ground, within any municipal corporation, operated by any motive power other than steam, and not a part of an interurban railroad, whether such railroad be termed street, inclined plane, elevated, or underground railroad, is a street railroad company;

When engaged in the business of operating as a common carrier, whether wholly or partially within this state, a part of a street railway constructed or extended beyond the limits of a municipal corporation, and not a part of an interurban railroad is a suburban railroad company;

When engaged in the business of operating a railroad, wholly or partially within this state, with one or more tracks from one municipal corporation or point in this state to another municipal corporation or point in this state, whether constructed upon the public highways or upon private rights-of-way, outside of municipalities, using electricity or other motive power than animal or steam power for the transportation of pasengers, packages, express matter, United States mail, baggage and freight, is an interurban railroad company, and included in the term "railroad" as used in section 501 of the General Code. The term "railroad,"

when used in this act, includes all railroads, interurban railroad companies, express companies, freight line companies, sleeping car companies, equipment companies, car companies, water transportation companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property within this state.

"Public Utility" Defined.

Section 4. The term "public utility" as used in this act, shall mean and include every corporation, company, co-partnership, person or association, their lessees, trustees or receivers, defined in the next preceding section, except such public utilities as operate their utilities not for profit, and except such public utilities as are, or may hereafter be owned or operated by any municipality, and except such utilities as are defined as "railroads" in sections 501 and 502 of the General Code and these terms shall apply in defining "public utilities" and "railroads" wherever used in chapter one, division two, title three, part first of the General Code and the acts amendatory or supplementary thereto or in this act.

Jurisdiction to Regulate "Public Utilities" and "Railroads."

Section 5. The public service commission of Ohio is hereby vested with the power and jurisdiction to supervise and regulate "public utilities" and "railroads" as herein defined and provided and to require all public utilities to furnish their products and render all services required by the commission, or by law.

Section 6. The jurisdiction, supervision, powers and duties of the public service commission shall extend to every public utility and railroad, the

plant or property of which lies wholly within this state and when the property of a public utility or railroad lies partly within and partly without this state to that part of such plant or property which lies within this state, and to the persons or companies owning, leasing or operating the same, and to the records and accounts of the business thereof done within this state.

General Supervision.

Section 10. The commission shall have general supervision over all public utilities within its jurisdiction as hereinbefore defined, and shall have the power to examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their properties are leased, operated, managed, and conducted with respect to the adequacy or accommodation afforded by their service, and also with respect to the safety and security of the public and their employes, and with respect to their compliance with all provisions of law, orders of the commission, franchises and charter requirements. The commission, either through its members or inspectors or employes, duly authorized by it, may enter in or upon, for purposes of inspection, any property, equipment, building, plant, factory, office, apparatus, machinery, device and lines of any public utility.

Power to Issue Stocks, Bonds, etc.

Section 56. A public utility or a railroad, as defined in this act, may, when authorized by order of the commission, and not otherwise, issue stocks, bonds, notes and other evidences of indebtedness, payable at periods of more than twelve months af-

ter date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities or for the improvement or maintenance of its service, or for the reorganization or readjustment of its indebtedness and capilitalization, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility or railroad not secured or obtained from the issue of stocks, bonds, notes or others evidences of indebtedness of such public utility or railroad within five years next prior to the filing of an application therefor as herein provided, or for any of the aforesaid purposes except maintenance of service and except replacements in cases where the applicant shall have kept its accounts and vouchers of such expenditures in such manner as to enable the commission to ascertain the amount of money so expended and the purposes for which said expenditure was made.

Commission May Authorize Issue.

The commission may, by order duly made, authorize the issue of bonds, notes, or other evidence of indebtedness, for the reimbursement of money heretofore actually expended from income for any of the aforesaid purposes, except maintenance of service and replacements prior to five years next preceding the filing of an application therefor, if such application for such consent be made prior to January 1, 1913.

Provided, however, that it shall be the duty of the commission to authorize, on the best terms obtainable, such issues of stocks, bonds and other evidence of indebtedness as shall be necessary to enable any public utility to comply with the provi-

sions of any contract heretofore made between such public utility and any municipality.

Proceedings to Obtain Authority.

Section 57. The proceedings for obtaining the consent and authority of the commission for such issue as provided in the next preceding section of this act, shall be as follows:

(a) In case the stocks, bonds, notes, or other evidence of indebtedness are to be issued for money only, the public utility or railroad shall file with the commission a statement, signed and verified by the president and secretary thereof, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness.

(2) The purposes for which they are to be issued.

(3) The terms upon which they are to be issued.

(4) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(5) If the issue is desired for the purpose of the reimbursement of money expended from income, as herein provided, the amount expended, when and for what purposes expended.

(6) Such other facts and information pertinent to the inquiry as the commission may require.

(b) If the stocks, bonds, notes or other evidence of indebtedness are to be issued, partly or wholly

for property or services or other consideration than money the public utility or railroad shall file with the commission a statement, signed and verified by its president and secretary, setting forth:

(1) The amount and character of the stocks, bonds or other evidence of indebtedness proposed to be issued.

(2) The purposes for which they are to be issued.

(3) The description and estimated value of the property or services for which they are to be issued.

(4) The terms on which they are to be issued or exchanged.

(5) The amount of money, if any, to be received from the same in addition to the property, service or other consideration.

(6) The total assets and liabilities of the public utility or railroad in such detail as the commission may require.

(7) Such other facts and information pertinent to the inquiry as the commission may require. Provided, however, that this section or the preceding section shall not apply to union depot companies heretofore organized, and under contract until the same are completed.

Consent and Approval of Commission.

Section 63. With the consent and approval of the commission, but not otherwise:

(a) Any two or more public utilities, furnishing a like service or product and doing business in the same municipality or locality within this state, or any two or more public utilities whose lines intersect or parallel each other within this state, may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other.

(b) Any public utility may purchase, or lease the property, plant or business of any other such public utility.

(c) Any such public utility may sell or lease its property or business to any other such public utility.

(d) Any such public utility may purchase the stock of any other such public utility.

The proceedings for obtaining the consent and approval of the commission for such authority, shall be as follows:

There shall be filed with the commission a petition, joint or otherwise, as the case may be, signed and verified by the president and secretary of the respective companies, clearly setting forth the object and purposes desired, stating whether or not it is for the purchase, sale, lease or making of contracts or for any other purpose in this section provided and also the terms and conditions of the same. The commission shall, upon the filing of such petition, if it deem the same necessary, fix a time and place for the hearing thereof. If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such pe-

tition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge therefor, it shall make such order in the premises as it may deem proper and the circumstances require, and thereupon it shall be lawful to do the things provided for in such order.

Void Contracts.

Section 65. All such contracts, leases, purchases, sales or consolidations not made pursuant to the provisions of this act or contrary hereto shall be void and of no effect.

Opinion in White v. Little Miami Light, Heat & Power Co.

[From 5 Ohio Nisi Prius Reports (N. S.), 201.]

EMINENT DOMAIN FOR THE PURPOSE OF CREATING WATER POWER.

(Probate Court of Clermont County.)

THE LITTLE MIAMI LIGHT, HEAT & POWER COMPANY

v.

JOHN T. WHITE *et al.**

Decided December 19, 1906.

Legislative Authority to Confer the Right of Eminent Domain—May be Granted to a Water Power Company—Where the Stream is not Navigable—Courts Will Not Interfere, Unless—Constitutionality of Section 3878.

1. Section 3878, Revised Statutes, as amended April 23, 1904, is a proper exercise of the constitutional power of the General Assembly, and not an abuse thereof.

*Affirmed by the common pleas, February 26, 1906, without report. Affirmed by the Circuit Court April 10, 1907, when the above opinion was read, approved and adopted by Swing, J., Giffin and Smith, JJ., concurring.

Note.—Judgment of Circuit Court affirmed by Supreme Court in 1908 as stated in brief.

2. The General Assembly possesses the constitutional power to confer upon a corporation the right to appropriate land for the erection of dams in non-navigable streams for the purpose of raising a head of water as power for the generation of electricity.

3. The judiciary will not interfere with the exercise of legislative authority in conferring the power of eminent domain, unless there appears to be a gross and manifest abuse of such authority.

PAXTON, J.:

The plaintiff corporation filed its petition in this Court for the appropriation of a tract of land consisting of about eight acres in Miami township, in this county, on the waters of the Little Miami River, the petition being in the usual form and containing the usual allegations of petitions for the appropriation of real estate. The defendants, John T. White *et al.*, having been duly served with summons, the cause came on for hearing upon the preliminary questions on December 19th, 1906. Afterwards a jury was called and empaneled, testimony of witnesses heard and a verdict for the defendants, John T. White *et al.* returned by the jury. A motion for a new trial was made by defendants and overruled, and judgment rendered on the verdict.

The matters presented to this Court for determination are those involved in the following preliminary questions, viz.:

1. The corporate existence; 2, Inability to agree with the owner; 3, The necessity for the appropriation; 4, The right to make the appropriation.

The plaintiff offered satisfactory and conclusive evidence to prove the facts involved in the preliminary questions, the defendants offering no evidence, but contending that the objects and purposes of the plaintiff corporation, as stated in its articles of incorporation, are such that it cannot properly be vested with the right of eminent domain, and that the land sought to be appropriated is not necessary for the purposes of the company.

The plaintiff corporation was incorporated on the 23rd day of July, 1906, under the general law of the State of Ohio. Following is a statement of the purposes of said company as the same are expressed in its articles of incorporation, viz.:

> "Third. Said corporation is formed for the purpose of acquiring, erecting, building, maintaining and operating dams in the Little Miami River, in the State of Ohio, to raise and maintain a head of water; of constructing and maintaining canals, locks and raceways to regulate and carry said head of water to any plant or power house where electricity is to be generated; of erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity; of acquiring, producing, manufacturing, generating and selling electricity for light, heat, power and other purposes; of acquiring, holding and selling franchises and privileges to supply the same to municipal corporations; of acquiring by condemnation, lease, purchase or otherwise, and of possessing, holding and selling such real estate and personal property as may be necessary or convenient for the proper conduct of said business, and of doing any and all other things necessary and incident to any of said purposes. Said company's improvements are to begin at the confluence of the Ohio and the Little Miami Rivers, in Hamilton

County, Ohio, and extend along the said Little Miami River and through the Counties of Hamilton, Clermont and Warren, to a point in said river opposite the Village of Morrow in said last named county."

Plaintiff claims the right of eminent domain under the provisions of Section 3878, Revised Statutes of Ohio, as amended April 23, 1904 (97 O. L., 300). By reference to that section it appears that the purposes for which the corporation is created bring it clearly within the meaning of that section, and give to it the right to appropriate private property. But it is claimed that the purposes and objects of the plaintiff corporation are such as to bring it within the limitation of the constitutional inhibition; that the use for which it is sought to appropriate the land is a private and not a public use (Section 19, Article I, and Section 5, Article XIII of the Constitution of Ohio).

The question, therefore, is: Had the Legislature the power to confer upon the corporation the right to condemn property for the purposes expressed in its articles of incorporation?

It has been held that the sections of the Constitution, above referred to, do not confer the power of eminent domain, but simply designate means for, and limitations upon, its exercise. This is in accordance with the definition of eminent domain that it is "a right inherent in all sovereignties, and, therefore, would exist without any constitutional recognition;" that it antedates Constitutions, which are only declaratory of previously existing universal law, and is not conferred, but is limited by them; that the title in fee of all property is held subject to the public user, of the neces-

sity or expediency of which use the Government itself must judge. And it is on the ground of the general public good that the Legislature grants to companies or bodies the compulsory power of taking the property of individuals.

The question whether or not a contemplated use is a public use, or for the public welfare, within the meaning of the Constitution, is one for the Legislature.

> Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326.

In deciding the case last referred to, Justice Ranney makes the following statement:

> "In saying that the exercise of this power properly belongs to the General Assembly and not to the judiciary, I do not intend to express a doubt that in cases where its limits have been exceeded, or its spirit and purpose abused, a judicial remedy may not be afforded."

The plain and obvious meaning of which is, that unless there should be a gross and manifest abuse of the power by the Legislature, the judiciary should not assume to determine it.

In this case the Legislature has declared that the use is a public one, and the Courts should hold it to be such, unless it manifestly has no tendency to promote such use (12 Cush., Mass., 475). There is a presumption in favor of the public character of the use arising from its having been authorized by the Legislature (12 Cush., Mass., 475). No general definition of what degree of public good will meet the constitutional requirement for a "public use" can be framed, as it is in every case a question of local policy.

Under certain general principles, however, upon which the decisions are based, the term "public use" is usually intended to cover a use affecting the public in general, or any number thereof, as distinguished from particular individuals. If the use is in fact a public one, its character is not changed by the fact that the control of the property sought to be taken will be vested in private persons, or private corporations, actuated solely by motives of private gain, and that private purposes will be thereby incidentally served.

On this subject the Supreme Court of Ohio has said, in Giesy *v.* C. W. & Z. Railroad Co., 4 Ohio State, 326:

> "It rests upon the public necessity—subordinates the rights of one to the welfare of all—and is just as broad as that necessity, and no broader. If the wants of the public are attained by the acquisition of an *easement,* nothing more can be taken; if the whole interest is required, the whole may be appropriated. Whether this power is derived from an implied condition in every grant, by which property is held under the Government, and whether where no constitutional restraints exist, it may be exercised without making compensation, are rather questions for ingenious speculation, than of practical importance."

There are numerous authorities sustaining the constitutionality of acts authorizing the flowage of water and the erection of dams in streams for the purpose of furnishing power to run mills of various kinds, but by reason of the comparatively recent date of the employment of electricity as power for general purposes, decisions are not to be found which are directly in point in the present case.

The non-navigable character of the Little Miami River, between the points named in plaintiff's articles of incorporation, is well established, thus taking out of the question the rights of the public in regard thereto. If we compare the purposes of this plaintiff with the purposes and uses of the mills above referred to and their respective relations to the public, it certainly will appear that the importance of plaintiff's proposed use of its powers is of vastly greater benefit to the public. The successful and economical generation of electricity by water power has long passed the experimental stage and its many uses for public and private purposes may not now be enumerated.

On the authorities, and for the reasons above given, judgment is rendered in favor of the plaintiff on all the preliminary questions in this case.

Opinion of Court of Appeals in Quo Warranto Case.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

THE STATE OF OHIO, on the Relation of Timothy S. Hogan, Attorney General, Plaintiff, vs. THE CLEVELAND, BEDFORD & GEAUGA LAKE TRACTION CO., Defendant.	No. 3284.

Decision.

Rendered on Tuesday, the 10th day of February, A. D. 1914.

SAYRE, J.; ALLREAD, J., and KUNKLE, J., concur.

The first question which arises in this case is, was the defendant a corporation, and was the statute complied with so as to create a corporation in contemplation of law. We are met by the case of The State of Ohio, on the relation of the Attorney General vs. Cincinnati Gas-Light and Coke Company, 18 O. S., 262. The first paragraph of the syllabus in that case reads as follows:

> "The information having been filed by the attorney general under the act of May 1, 1852,

> against the defendant, by its corporate name, charging a usurpation of certain corporate franchises, and process having been issued and served accordingly, and the defendant having appeared and pleaded in a corporate capacity, setting up its charter, etc., it is not competent for the state, by replication, to deny the corporate existence of the defendant. Where the franchise to be a corporation is intended to be drawn in question, the proceedings should, under our statutes, be against the individuals who usurp such franchises."

The statute by favor of which this suit is brought is substantially the same as the act of May 1, 1852. The State, therefore having brought this suit against the defendant as a corporation, and process having been issued and served accordingly, can not now in this action challenged the legal incorporation of the defendant. The question for determination then is, whether the defendant "has misused a franchise, privilege, or right conferred upon it by law * * * or has exercised a franchise, privilege, or right in contravention of law"—paragraph 4, section 12304.

The defendant is charged with misusing its corporate rights by:

(a) Violating sections 8806, 8807, and 8808;

(b) Making the conveyance of October 10, 1912;

(c) Appropriating land for the benefit of another.

Sections 8806, 8807 and 8808 apply only to railroads and not to interurban roads, which are classed with street railroads.

Ohio Electric Ry. Co. vs. Ottawa, 85 O. S., 229.

It is contended by plaintiff that by making the contract of October 10, 1912, conveying its real estate to The Northern Ohio Traction and Light Company, the defendant abandoned the land which it acquired by appropriation, and the attempt to so convey was a misuse of its corporate franchise.

This contention and the other one made by counsel for the state, viz.: that the appropriation of land was for the sole benefit of The Northern Ohio Traction and Light Company, may be considered together.

The evidence clearly establishes the fact that the defendant is, and always has been, "the dummy" of The Northern Ohio Traction and Light Company. Smartt, the promoter of the defendant company and the only person outside of the officers of the former who had any interest in the same, was the hired servant of The Northern Ohio. He was its man, and entirely under its control. The contract of November 24, 1906, authorized The Northern Ohio to run its limited cars over the tracks of defendant and thus the defendant, by reason of the track being within a distance of 200 to 800 feet from the track of The Northern Ohio, would come into competition with the later company for the local traffic. The Ohio Northern would doubtless never have entered into such contract without expecting and intending to have com-

plete control of the defendant company. This fact together with the other evidence in the case would demonstrate that from the beginning the defendant company was to be and has been the mere creature of The Northern Ohio. Its life depends upon the will of its master. It is fair, therefore, to conclude that the appropriation of property by the defendant was for the benefit of The Northern Ohio, and the sale of October 10, 1912, was for the same purpose.

The contracts of November 24, 1906, and October 12, 1912, were thinly veiled attempts to conceal the real situation.

It is no answer to say that The Northern Ohio could legally have built this new line without the use of a "dummy." For the question is not what The Northern Ohio could or could not do, but what the defendant did do.

See

Platt vs. Pennsylvania Company, 43 O. S., 339.

In appropriating land for the benefit of another company, and in transferring such land to that company, the defendant has misused its corporate franchise. If the defendant company had appropriated the land for its own purposes, in good faith, as would appear on the face of the contract of November 24, 1906, and then had conveyed the property to The Northern Ohio the case would fall within the rule announced in Garlick vs. Railway Co., *et al.*, 67 O. S., 223. But here the property was appropriated, in the first instance, for the sole benefit of The Northern Ohio.

It therefore remains for the court to determine what the judgment shall be.

The greater part of the right of way was purchased. There were only a few appropriation proceedings. Counsel say that no more is intended. Be that as it may, it is difficult to see why the court should go to the limit of ousting the defendant of its franchise to be a corporation, and yet the court would, no doubt, fail in its duty if it did not oust the defendant of its right to appropriate private property. This will not be a heavy punishment if the defendant never has reason again to desire to exercise this right; but it may so desire and because of its past conduct this right should be taken away.

Decrees accordingly.

Opinion of Circuit Court as to Sufficiency of Description.

State of Ohio, }
Summit County, } ss.:

IN THE CIRCUIT COURT,

EIGHTH CIRCUIT.

OCTOBER TERM, 1911.

THE CUYAHOGA RIVER POWER CO., Plaintiff in Error, vs. THE NORTHERN REALTY COMPANY, Defendant in Error.	No. 992, Opinion. Rendered Oct. 27, 1911.

Error to the Court of Common Pleas.

MARVIN, WINCH AND HENRY, JJ.

MARVIN, J.,

The parties here are as they were in the court below. The action was begun in the Probate Court, in which the plaintiff sought to appropriate, and have damages assessed for the appropriation of certain real estate of the defendant.

The Probate Court dismissed the petition, and on error in the Common Pleas Court, such judg-

ment of dismissal was affirmed. It is here sought to reverse the judgments.

The only question presented, which, in our view of the case, requires our consideration, is whether the description in the petition of the lands sought to be appropriated, is sufficient under the statute. By section 11042 of the General Code of the state, it is provided that in proceedings for appropriation of real estate, "The corporation may file a petition with the Probate Judge, verified as in a civil action, containing a specific description of each parcel of property.....within the county sought to be appropriated," etc. The description given in the petition in this case is in these words:

> "Situated in Summit County, Ohio, and beginning at the point in the intersection of the center of the Cuyahoga River and the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east 100 feet; thence easterly and southeasterly along the northerly bank of said Cuyahoga River 100 feet distant from the center line of said river, following the meandering of the same, to a point on the line between the property of said The Northern Realty Company and the property of the A. B. & C. R. R. Company, said point being 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; then south 1 degree 20′ west along said line between the property of The Northern Realty Company and the property of the A. B. & C. R. R. Company; thence south 88 degrees east along the south line of the property of the A. B. & C. R. R. Company, said line being the dividing line between the property of

the A. B. & C. R. R. Company, and the property of The Northern Realty Company, to a point 100 feet distant from the center of the Cuyahoga River, measured at right angles with same; thence southeasterly and northeasterly along the northerly bank of the Cuyahoga River 100 feet distant from the center line thereof, and following the meanderings of same, to a point on a line of the land of said The Northern Realty Company, said line being an extension northerly of the east line of Tract No. 3, Portage Township, Summit County, Ohio, and also being 100 feet distant from the center of the Cuyahoga River measured at right angles with same; thence northerly along said line to a stone pipe; thence northerly along the high bank of the Cuyahoga River and one rod westerly of same the following courses and distances: north 34 degrees 35′ east 264 feet; thence north 27 degrees 35′ east 286.44 feet; thence north 2 degrees 30′ west 116.16 feet; thence north 24 degrees 10′ west 138 feet; thence north 8 degrees 40′ east 107.6 feet; thence north 19 degrees 31′ east 108.24 feet; thence north 36 degrees 40′ east 168.3 feet; thence north 53 degrees 40′ east 454.7 feet; thence north 35 degrees east 280.7 feet to the northeast corner of the lot owned by Tom Patterson; thence northerly following along the westerly bank of said Cuyahoga River to the southeast corner of the property formerly belonging to The Falls Rivet & Machine Company; thence along the line between the land formerly belonging to The Falls Rivet & Machine Company and the property of The Northern Realty Company to a point on the westerly bank of said river, where said boundary line crosses said river; thence south 75 degrees east 157 feet along the line between the property formerly belonging to The Falls Rivet & Machine Company and the lands of said The

Northern Realty Company to a point on the top of the bank on the easterly side of said Cuyahoga River; thence south 23 degrees west 118.80 feet along the top of said east bank; thence south 63 degrees east 52 feet to the west line of Water Street where an iron grate bar is set; thence south 22 degrees 30′ west 660 feet along the west line of Water Street to an iron pin; thence south 17 degrees 30′ west 663.34 feet along the west side of Water Street to an iron pin; thence north 63 degrees 37′ west 128.4 feet along north line of land formerly belonging to C. S. Sill to an iron pipe; thence south 31 degrees 30′ west 317.46 feet along the west line of same land to an iron pipe; thence south 41 degrees 30′ west 341.88 feet along the west line of said Sill's land to an iron pin; thence southerly and westerly along the southerly bank of said Cuyahoga River and approximately 100 feet distant from the center line of said river; following the meanderings of same to a point on the north and south township line between Portage Township and Cuyahoga Falls Township; thence north 0 degrees 30′ east along said township line 100 feet to the place of beginning. Contains 40 acres more or less, with all the privileges, easements, rights and appurtenances thereunto belonging."

It will be noticed that the point of beginning is fixed and definite; that courses, distances and monuments are given in the description, so that the boundary can be followed up to and including the monument, from which, the line next before the last boundary line is given. This monument is an iron pin in the west line of land formerly belonging to C. S. Sill. Going thence to the point at which the description ends, viz: the place of be-

ginning, from this point follow the last line contained in the description, reversing it, and going from the place of beginning south to the point on the line between Portage Township and Cuyahoga Falls Township, 100 feet by such line, and we have a point definitely fixed at which the line next preceding the last line of the description ends. We now have both the point of beginning and ending of this one line, which, it is said, is so indefinitely described as to make the description defective in failing to conform to that required by the statute, to wit: a "specific description."

This contention we hold is not sound. The line which is to end at the point 100 feet from the beginning point, measured southerly along the line between Portage Township and Cuyahoga Falls Township, and which is to begin at a monument, to wit: the iron pin already mentioned in Sill's line, is to be along the south bank of the Cuyahoga River, following the meandering of the center line of such river and approximately 100 feet therefrom.

It is this word "approximately" that is said to make the description indefinite, but when we know the termini of this line, and that its course is to follow the meanderings of the center line of the river, it seems that a surveyor would be able to fix the line. Definitions of the word "approximate" are given to us in brief of counsel, but its meaning is generally understood by people who are familiar with the English language. As here used, it means "about," "near to." The propriety of using this word in this description seems manifest from the fact that though the terminus of the line at one end is just 100 feet, from the center of the river,

its other terminus may be more or less than that. The description does not advise us, but it is a fixed point, and is at some certain distance from the center line of this river. The line between these termini, if it follows the meanderings of the center line of the river, would be just 100 feet from the center line of the river during its whole course, if its beginning point were just 100 feet from such center line. The description does not show whether this beginning point is just 100 feet, or more or less than 100 feet, from that center line, but it does show that that line is to follow following the meanderings of the center line of the river, and that, of course, means following them regularly, making the turns that the center line of the river makes wherever such turns are made, and that it is to end at a fixed point just 100 feet from the center line of the river. This would seem to us to be as "specific" as it could well be made.

Entertaining this view, it follows that the judgment of the probate court dismissing the petition on the ground that the description was not "specific" under the statute, and the judgment of the court of common pleas affirming such judgment, must be reversed, and the cause remanded to the probate court for further proceedings.

This reversal is not based upon any error other than that already pointed out. We think the court was right in holding that if there were such defect in the description given in the petition as that it failed to meet the requirements of the statute, such failure could not be corrected by amendment.

Messrs. D. C. Westenhaver and Willis Bacon,
Counsel for Plaintiff in Error.

Messrs. Rogers & Rowley,
Counsel for Defendant in Error.

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JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916

No. 342

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error

against

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION & LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR
In Opposition to Motion to Dismiss or Affirm.

WILLIAM Z. DAVIS, Columbus, O.
JOHN L. WELLS,
CARROLL G. WALTER, } New York.
Counsel for Plaintiff-in-Error.

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Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

No. 342.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR PLAINTIFF-IN-ERROR

In Opposition to Motion to Dismiss or Affirm.

(The plaintiff-in-error has already filed its brief upon the whole case. We respectfully ask that that brief be read in opposition to this motion in connection with this brief)

This writ of error was allowed by Mr. Justice PITNEY on September 9, 1915. The case was docketed by the plaintiff-in-error on January 8, 1916. The printing of the record was completed in December, 1916; and in February, 1917, the plaintiff-

in-error served and filed a 125-page brief in support of its contentions.

Now, practically on the eve of the time for oral argument, the defendants-in-error submit this motion (*a*) to dismiss the writ of error for want of jurisdiction, or (*b*) to affirm the judgment upon the ground that it is manifestly correct.

The propositions advanced in support of the motion to dismiss are:

1.—The writ of error should have been directed to the Supreme Court of Ohio instead of to the Court of Appeals.

2.—The alleged Federal questions did not control the decision of the state court.

3.—No Federal question is involved in the case.

The brief submitted in support of the motion is confined to these propositions—no attempt being made to support the motion to affirm except as it may be involved in the last-stated ground of the motion to dismiss.

We will answer these three propositions in turn, except that we reverse the order of the second and third so as to avoid unnecessary repetition by showing the existence of Federal questions before undertaking to show that the Federal questions control the decision of the case.

I.

Repeated decisions of this Court conclusively establish that the writ of error was properly directed to the Court of Appeals.

This case was originally tried in the Court of Common Pleas of Summit County. Its judgment was reviewed and affirmed by the Court of Appeals to which this writ of error is directed.

After this affirmance the plaintiff moved the Supreme Court of Ohio "for an order requiring the Court of Appeals of Summit County to certify its record in said case to (said Supreme) Court for review" (Record, pp. 312-314). It also filed in the Supreme Court a "petition in error," wherein it prayed "that said judgment may be reversed" and that the plaintiff "may be restored to all things it has lost by reason thereof" (Record, pp. 315, 316). The defendants thereupon moved the Supreme Court to dismiss the petition in error *upon the ground that the judgment of the Court of Appeals was final and that the Supreme Court had no jurisdiction* (Record, pp. 317, 318). The two motions were heard together, and upon consideration thereof the Supreme Court found that it was "WITHOUT JURISDICTION IN THE PREMISES" and accordingly sustained the defendants' motion to dismiss the petition in error and overruled the plaintiff's motion to direct the Court of Appeals to certify the record (Record, pp. 319, 320).

It would seem that no amount of argument could either clarify or obscure the obvious fact that the Supreme Court of Ohio *did not exercise*

any jurisdiction in the case and did not review or affirm the judgment. Its order expressly states that it is *without jurisdiction.* And under the rule announced in *Norfolk Turnpike Co.* v. *Virginia,* 225 U. S., 264, 269—which announcement was expressly stated to be *"for the guidance of suitors in the future"*—it is very clear that it would have been improper and ineffective for the plaintiff to attempt to bring the case to this court by means of a writ of error directed to the Supreme Court of Ohio. The rule stated by Mr. Chief Justice WHITE in the case just cited was as follows:

> "While, therefore, in this case, for the reasons stated, we entertain jurisdiction and do not of our own motion dismiss the writ, for the purpose of avoiding the complexity and doubt which must continue to recur and for the guidance of suitors in the future we now state that, from and after the opening of the next term of this court, where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a State declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by *an affirmance in express terms* of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was *the exercise by it of jurisdiction to review the case upon the merits,* we shall consider ourselves constrained to apply the rule announced in the *Crovo Case.*"*

*Western Union Telegraph Co. v. Crovo, 220 U. S., 364, 366, where it is laid down that, where the Supreme Court of the State refuses a writ of error, the court below is the highest court of the State to which the case can be carried and the writ of error is properly directed to that court, even though the State Supreme Court refuse the writ upon the ground that the judgment is plainly right.

It necessarily follows that the writ in the case at bar was properly directed to the Court of Appeals rather than to the Supreme Court, because the record of the proceedings had in that court do not show "an affirmance in express terms of the judgment or decree sought to be reviewed," and the action taken by the Supreme Court was not "the exercise by it of jurisdiction to review the case upon the merits." The defendants, indeed, admit this at page 6 of their brief, where it is said:

> "We appreciate that the Supreme Court of Ohio *did not affirm in express terms the judgment of the Court of Appeals,* and also that the Supreme Court *did not exercise its jurisdiction to review the entire case upon the merits.*"

The defendants contend, however, that this case does not come within the rule stated in *Norfolk Turnpike Co.* v. *Virginia, supra,* because in this case the Supreme Court of Ohio "did not decline to allow a writ of error to the Court of Appeals" (Brief, p. 6). They assert that "the Supreme Court had no discretion in that regard," and that the petition in error was filed *as a matter of right* (Brief, p. 5). Upon the basis of these assertions, they insist that despite the explicit language of the order of the Supreme Court of Ohio to the effect that it was "without jurisdiction in the premises," the Supreme Court of Ohio actually did take jurisdiction and determine "the very question which this court must decide" (Brief, p. 8).

The groundlessness of this argument is demonstrated by the decision in *Western Union Tel. Co.*

v. *Hughes,* 203 U. S., 505. In that case the Supreme Court of Appeals of Virginia *did not decline to allow a writ of error,* but, on the contrary, did allow the writ and hear argument of the case and write an opinion. Yet it was held by this court that, inasmuch as the State Supreme Court subsequently *dismissed* the writ of error, the proper method by which to bring the case here was by means of a writ of error to the inferior State Court rather than to the Supreme Court of Appeals.

The defendants seek to distinguish that case upon the ground that the Supreme Court of Appeals dismissed the writ upon the ground that it was "improvidently awarded," which, say the defendants, "naturally implied that the court had jurisdiction to entertain the writ or not in its discretion" (Brief, p. 7). The fact was, however, that the Virginia court thought the writ was "improvidently awarded" *because it was without jurisdiction* (203 U. S., 506).

Certainly the filing of the plaintiff's "petition in error" in the Ohio Supreme Court in the case at bar had no greater or different effect than the Virginia court's allowance of a writ of error in the *Hughes case;* and inasmuch as the Ohio Supreme Court subsequently dismissed the petition in error *pursuant to the granting of the defendants' motion to dismiss it upon the ground that the court was without jurisdiction,* it necessarily follows, under the doctrine laid down by this court in the *Hughes case,* that the proper method by which to bring the case here is by writ of error to the Court of Appeals, just as the plaintiff here has done.

It was argued in the *Hughes case,* just as it is

argued here, that the Virginia court's order of dismissal was a "final judgment"; but this contention was rejected. In so holding, Mr. Chief Justice WHITE said:

> "Treating the order of dismissal as a final judgment, we are now asked on this writ of error to reverse the ruling of the Supreme Court of Appeals of Virginia. This, however, we cannot do. *It is immaterial that the Supreme Court of Appeals was vested by the State Constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the constitution of Virginia or of the United States, or that in the opinion delivered by the court it discussed the Federal question and declared it to be without merit.* The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. *Missouri, K. & T. Ry.* v. *Elliott,* 184 U. S., 530, 539."

The defendants' argument is, furthermore, entirely foreclosed by other recent decisions of this court upon this precise question:

(1) *Stratton* v. *Stratton*, 239 U. S., 55;

(2) *Valley Steamship Co.* v. *Wattawa*, 241 U. S., 642;

(3) *Second Natl. Bank* v. *First Natl. Bank*, 242 U. S., 600;

(4) *Cleveland, &c., Ry. Co.* v. *Dettlebach*, 239 U. S., 588.

Each of these cases involved a consideration of the correct practice with respect to writs of error from this court to the courts of Ohio.

In (1) a writ of error to the Court of Appeals had been obtained *without first invoking what this court designated as the "gracious or discretionary" power of the Supreme Court to review the judgment*, and the writ was dismissed because of this failure to attempt to obtain a review of the case by the Supreme Court.

In (2) the writ of error was directed *to the Supreme Court of Ohio* and was dismissed by this court for want of jurisdiction

> "upon the authority of *Western Union Telegraph Co.* v. *Crovo*, 220 U. S., 364, 366, *Norfolk Turnpike Co.* v. *Virginia*, 225 U. S., 264, 268, 269, *Stratton* v. *Stratton*, 239 U. S., 55."

In (3) the writ of error was directed to *the trial court* after there had been an affirmance of the judgment by the Court of Appeals and a refusal by the Supreme Court "to direct the Court of Appeals to certify its record to the Supreme Court for review;" and the writ was dismissed *because this court was of the opinion that "the writ of error should have been directed to the Court of Appeals, as that, under the Constitution*

and laws of the State of Ohio, is the highest court in which a final judgment could be rendered in this case in view of the refusal of the Supreme Court of Ohio to grant the motion to certify to it the record of the Court of Appeals."

In (4), *as in the case at bar,* the writ of error was directed to the Court of Appeals after the Supreme Court had declined to review the judgment, *and the writ was sustained by this court and the judgment reversed.*

It thus appears that since the remodeling of the judiciary of Ohio by the Constitution of 1912 every possible method of getting a case from the State court to this court has been tried by different attorneys, *and the only practice which has been sustained is the practice adopted by the plaintiff-in-error in this case.* This court has successively dismissed writs of error directed to the Supreme Court of the State, to the trial court, and to the Court of Appeals where no attempt had been made to get the Supreme Court to review the judgment. On the other hand, in a case in which the writ was directed to the Court of Appeals after the Supreme Court had declined to review the judgment, this court took jurisdiction and reversed the judgment (*Dettlebach case, supra*), and in another case this court has expressly stated that, where the Supreme Court refuses to grant a motion to require the Court of Appeals to certify the record to it, the Court of Appeals "is the highest court in which a final judgment could be rendered" and that the writ of error should be directed to that court (*Second Natl. Bank* v. *First Natl. Bank, supra*).

Moreover, an examination of the records in the *Dettlebach* and *Wattawa* cases discloses that in

each of them the procedure with reference to getting the case before the Ohio Supreme Court was identical with the procedure adopted in the case at bar, *i. e.*, in each of those cases the plaintiffs moved the Supreme Court to direct the Court of Appeals to certify its record to the Supreme Court *and also filed a petition in error in the Supreme Court setting up constitutional questions.* In each of those cases, too, the State Supreme Court *dismissed the petition in error* and overruled the motion to certify the record, just as it did in the case at bar. The cases are, therefore, directly in point and controlling here. It may be observed, also, that in the *Wattawa case*, an elaborate brief was filed in support of the view that the writ of error from this court was properly directed to the Supreme Court of Ohio because that court had "no discretion" with respect to exercising jurisdiction in cases involving constitutional questions and the petition in error had been filed in the State Supreme Court *as a matter of right*, and that the dismissal of the petition thus involved an exercise of jurisdiction. The argument advanced was substantially the same as that now advanced by the defendants in this case. Yet, as we have seen, this court dismissed the writ of error for want of jurisdiction.

Thus, the attempt to distinguish the case from *Western Union Tel. Co.* v. *Crovo* and *Norfolk Turnpike Co.* v. *Virginia*, *supra*, has been already made and rejected by this court.

The defendants refer to *Missouri K. & T. Ry.* v. *Elliott*, 184 U. S., 530, and attempt to escape its force by saying that the ruling in that case to the effect that the writ was properly directed to the Kansas City Court of Appeals, instead of

to the Supreme Court of Missouri, "was based upon the peculiar language of the Missouri Constitution." But a reading of the case will disclose a substantial identity, and the opinion by Mr. Chief Justice WHITE in that case completely demonstrates that the Ohio Supreme Court's dismissal of the petition in error in the case at bar was not the exercise of jurisdiction, but merely a finding that it did not have jurisdiction (pp. 535-539).

Incidentally, that case shows, also, that even though the Ohio Supreme Court's refusal to take jurisdiction were based upon its opinion that no constitutional question was involved in this case, such refusal would be in no way controlling upon this court, either with respect to jurisdiction or with respect to the merits of the case; for in the case last cited this court took jurisdiction of a writ of error to the Kansas City Court of Appeals and reversed the judgment despite the Missouri Supreme Court's holding that the case involved no Federal questions. The same thing is shown by the above quotation from the *Hughes case;* and to the same effect is *Wabash R. R. Co.* v. *Pearce,* 192 U. S., 179, where the State Supreme Court refused to take jurisdiction because it was of the opinion that no Federal question was involved and, despite that fact, this court took jurisdiction and reversed the judgment of the inferior State Court which the State Supreme Court had declined to review.

Finally, there is still another conclusive reason why the writ of error in this case could not be directed to the Ohio Supreme Court. THE RECORD OF THE CASE WAS NOT THERE; and a writ directed

to that court would thus have been a vain and futile thing. It is a long-established rule that the writ must be sent to the court which has the record; and this is the proper practice even where the highest court of the State has actually taken jurisdiction of the case and decided it upon its merits.

Sioux Remedy Co. v. *Cope,* 235 U. S., 197, 200;
Shanks v. *D. L. & W. R. R.,* 239 U. S., 556.

See, also, the following cases, which are but a few of the many cases in which, in accordance with this rule, the writ was directed to an inferior State court, although the highest State court had passed upon the case:

Keeney v. *New York,* 222 U. S., 525;
Erie R. R. v. *New York,* 233 U. S., 671;
Erie R. R. v. *Williams, id.,* 285;
Cornell Steamboat Co. v. *Phoenix Const. Co., id.,* 593;
Interborough Rapid Transit Co. v. *Sohmer,* 237 U. S., 276;
Knapp v. *Alexander Co., id.,* 162.

It is perfectly plain, we submit, that this branch of the motion is clearly untenable and *could not be sustained without overturning a long line of decisions of this court, upon which the plaintiff relied and was clearly justified in relying.*

II.

The case clearly involves Federal questions of a grave and substantial character.

The defendants explicitly state that they "assume that the plaintiff is right in its contention that under its charter, followed by the adoption of its plan of development, it acquired *a contract or property right in the lands located in the valley of the Cuyahoga River needed for its development purposes*" (Brief, p. 19). And in no place throughout the brief do they contend that the plaintiff has not been deprived of that contract and property right in this case. On the contrary, the defendants recognize the fact that "the contract which plaintiff claims has been impaired and its property of which it claims it has been deprived without due process of law are its alleged *right to condemn the defendants' land for its development purposes*" (Brief, p. 22); and there is, of course, no question but that this *right to condemn* has been denied. That is undisputed.

The admitted situation, then, is this: The plaintiff claims, and upon this motion is assumed to have, a contract and property right to condemn the defendants' land, and concededly it has been denied and deprived of that right.

The case thus clearly involves the questions (1) whether the denial of that contract and property right constitutes a deprivation of property without due process of law, and (2) whether the denial involves an unconstitutional impairment of the contract.

With respect to the claim that the plaintiff's

contract has been impaired, the defendants' contention is that jurisdiction to determine that claim does not exist because the impairment "is not the result of any *legislative* action" (Brief, p. 20). To substantiate that contention they assert that their defense that "the property which plaintiff was endeavoring to condemn had already been devoted to a public use does not involve the assertion of the right of eminent domain, but even if it did, nothing is presented in the nature of a legislative act subsequent to the creation of plaintiff's alleged contract" (Brief, p. 20). The assertion, however, is purely *dogmatic*. No attempt is made to answer the argument upon that question which is presented in Point V of the brief already filed herein on behalf of the plaintiff. Without repeating that argument here, we beg to refer the court to that portion of our brief—calling particular attention to the cases showing that a "legislative act" within the meaning of the contract clause of the Federal Constitution may consist of "any exertion of the legislative power of the State" and to the other cases showing that a devotion of property to a public use is an exertion of such legislative power. We also direct attention to Point VI of our brief, in which it is shown that in rendering its judgment the State court necessarily gave effect to the Ohio Public Service Commission Act, which was passed subsequent to the time the plaintiff obtained its contract. *The defendants make no attempt whatever to controvert that proposition.*

With respect to the question of due process of law, the plaintiff claims that due process is lacking for several reasons, viz., its property has been taken: (a) without compensation, (b) for a private use, (c) not in the regular course of legal pro-

ceedings and without an opportunity to be heard, (d) not pursuant to any law authorizing the taking. (See Points III and IV of our brief already filed herein, to which we respectfully direct the court's attention.)

The defendants, upon this motion, make *no answer to propositions* (*b*) *and* (*d*). Indeed, they baldly assert that these are *not Federal questions* (see page 26 of their brief, where, after enumerating the questions discussed in our brief, including the contentions as to private use and the necessity for the existence of a law authorizing a taking of property for a public use, they state that "there is not a Federal question in the list"). But if anything be settled it is that the question as to the character of the use for which property is taken is essentially Federal (see cases cited on pages 55 and 56 of our brief); and this court has expressly recognized that "a law authorizing it" is essential to due process in the taking of property for a public use (*Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S., 390, 400, cited at pages 72, 73 of our brief). It is manifest, therefore, that the defendants' contention that no Federal question is involved, proceeds upon a very erroneous notion as to what constitutes a Federal question.

In answer to proposition (c), to wit, the claim that the plaintiff's property has been taken not in the course of legal proceedings and without an opportunity to be heard, the defendants say that, inasmuch as the plaintiff itself instituted the proceeding in which the judgment was rendered, and inasmuch as the court admittedly had jurisdiction to hear and determine the issues, the proposition resolves itself into the mere claim that the State Court's decision is erroneous. This assertion evinces a misconception of the basis of our con-

tention upon this point. Our contention that the plaintiff's property has been taken from it without an opportunity to be heard has no reference whatever to any finding the State Court may have made with respect to the issues involved in the proceeding instituted by the plaintiff. The ground of the contention is that the necessary operation of the judgment is to *go beyond the issues presented in that proceeding* and, in effect, permit The Northern Ohio Power Company, which was not a party to the proceeding, to take the plaintiff's property (*i.e.*, deprive it of its right to acquire the defendants' land) by acts *in pais, without requiring said Northern Ohio Power Company to prove its corporate existence and right to appropriate property for a public use.** The "ab-

*In this connection we call particular attention to pages 77 and 78 of the brief already filed herein on behalf of the plaintiff, where it is pointed out that, if the plaintiff's right to acquire the land be a property right to which the land was subject or subservient, no one could obtain a full title to the land or a right to use it for any purpose inconsistent with the plaintiff's use **without acquiring this right of the plaintiff and paying just compensation therefor**; and as the judgment under review, in consequence of its having sustained the claim of a devotion of the property to a public use by The Northern Ohio Power Company, has the effect of giving to the defendants a full title and right of exclusive use, free of any claim of the plaintiff, the judgment obviously has all the effect of a judgment in an appropriation proceeding brought **against** the plaintiff. In other words, although the proceeding was instituted by the plaintiff for the purpose of appropriating property to its own use, the result of the judgment is to permit The Northern Ohio Power Company, without any hearing or trial, to appropriate the plaintiff's property to the defendants' use.

It is important to note, also, that the Ohio statutes clearly recognize that it frequently may happen that an appropriation of something other than merely physical objects is essential. Thus, in Section 11042, which relates to the petition to be filed in appropriation proceedings, it is provided that the petition shall describe "each parcel of property, **interest**, or **RIGHT**, within the county, sought to be appropriated." Obviously, therefore, even though the plaintiff had no title to the soil it was yet incumbent upon The Northern Ohio Power Company to appropriate, by a formal proceeding in court, the plaintiff's "**right**" to acquire the land, before it could become constitutionally entitled to hold the land free of this right of the plaintiff; and in such proceeding it would have been necessary for The Northern Ohio Power Company to establish by proof its own corporate existence and its own "right to appropriate" property for a public use.

sence of legal proceedings" of which we complain is the absence of any proceeding by The Northern Ohio Power Company to acquire the plaintiff's property; and the lack of "notice and opportunity to be heard" of which we complain is the lack of any notice of the taking by The Northern Ohio Power Company and the lack of any opportunity to be heard upon the questions of the corporate existence *of that company* and *its* right to make the appropriation.

The defendants cite the case of *Macdonald* v. *Oregon R. & N. Co.*, 233 U. S., 665, as supporting their contention, but in that case both parties had full and ample opportunity to be heard upon all questions respecting their rights, and the only complaint was that the State court had afforded to one of the parties a more extensive measure of relief than the other thought was justified by the evidence. The case is not pertinent. The case which fits the situation here disclosed is *Stewart* v. *Michigan*, 232 U. S., 665. In that case Stewart was convicted of peddling without having obtained a license. Upon the argument in this court it was conceded that the judgment was erroneous in so far as it held that there could be a conviction because of sales made in the course of interstate commerce, but it was sought to sustain the judgment because the State Supreme Court had found that "there was evidence showing some sales made from the car or storeroom not under previous orders, and as the latter sales were not within the shelter of the commerce clause, therefore the affirmance on that ground was an independent non-Federal conclusion sustaining the action of the court and calling for the duty of af-

firmance." Mr. Chief Justice WHITE answered that contention as follows:

> "But this proposition disregards the fact that the only charge made against the accused was for peddling and that the instructions of the court and the whole course of the trial conclusively established that the sales made from the car, as the result of the orders solicited, formed the sole basis for the prosecution, and the conviction therefore related to that and to that alone. If then it be admitted that the judgment below was placed upon two grounds, such admission would not establish that the judgment rested upon an independent state ground adequate to sustain it, since the first ground it is admitted was Federal and erroneous, *and the second ground if upheld would amount to a condemnation without hearing and therefore constitute a denial of due process of law.*"

Of course it cannot be denied that "condemnation without hearing" is a denial of due process of law in civil cases as well as in criminal cases; and, paraphrasing the language just quoted, we insist that the questions as to the corporate existence of The Northern Ohio Power Company and its right to appropriate property for a public use were not within the issues legally presented by the proceeding instituted by the plaintiff, and that, in treating that so-called corporation as a real entity having power to appropriate property to a public use and giving effect to its alleged devotion of the land to a public use, the State Court has rendered judgment upon matters not within the issues and thus upheld "a condemnation without hearing"

and therefore denied due process of law to the plaintiff. The situation is precisely the same, in its constitutional aspect, as if a person had been tried and convicted for an offense not charged in the indictment. (See, also, Point IV of brief heretofore filed herein on behalf of the plaintiff.)

In answer to proposition (a), to wit, the claim that the plaintiff's property has been taken without compensation, the defendants admit that, under the rule stated in *Chicago, B. & Q. R. R. Co.* v. *Chicago,* 166 U. S., 226, the payment of compensation for property taken for a public use is an essential element of due process of law, but seek to distinguish that case as follows (Brief, p. 23):

> "This authority might be in point if the defendants were condemning the plaintiff's property and secured a judgment in their favor without the award of any compensation to plaintiff for the property taken. This is not that kind of a case. The court denied the plaintiff's right to condemn the defendants' property. *It did not grant the defendants the right to condemn plaintiff's property without compensation.*"

Of course the defendants were not, actively and in form, seeking a condemnation of the plaintiff's property, but, as already pointed out, the necessary effect of the judgment is to accord them that relief, because, by virtue of the judgment, they have become entitled to hold the land free of any claim of the plaintiff and free of any obligation to compensate it for the rights of which it has been deprived. In other words, the defendants have obtained all the relief which they could obtain if they had instituted a condemnation proceeding

against the plaintiff and consequently the State court did, in effect, "grant the defendants the right to condemn plaintiffs' property without compensation."

It is hardly necessary to add that the constitutional provision that private property cannot be taken for a public use except upon the payment of just compensation is not confined to cases where the party seeking to take the property actually goes into court and seeks a judgment of condemnation. It is equally applicable to those cases in which the taking is sought to be accomplished without a formal appropriation proceeding. Indeed, the instances are exceedingly rare in which it is necessary to invoke the constitutional guaranty in cases where there is a condemnation proceeding pending, for in the cases where a party seeking to take property for a public use voluntarily commences an appropriation proceeding there is generally no attempt to escape the obligation of making just compensation. It is in those cases in which, as here, the taking is "*disguised in an ambiguous form*" and is sought to be accomplished without a condemnation proceeding that the constitutional guaranty becomes of real importance. If it afforded protection only in the cases in which its obligation is recognized and admitted it would be of little efficacy.

The defendants make this further contention (Brief, p. 24):

> "There is no doubt that the State had authority to authorize the court to deny the right to condemn to any party where the property which said party proposes to condemn has *already* been devoted to public use. As a matter of fact this is a general principle

> of law and if it be true, as alleged by the plaintiff, that the state court acted upon it in this case, it does not follow that a Federal question is presented. On the contrary plaintiff's position resolves itself into nothing more than a charge that the decision of the State Court was erroneous."

They attempt to fortify the contention by the citation of cases illustrating the general rule that "whether the State *could,* not whether the State *did,* authorize the procedure followed, is ordinarily the only question open for consideration by the Federal courts upon a writ of error." We do not dispute this general rule. The fallacy underlying the defendants' attempt to apply it in this case is their naïve omission to state that the question in this case is not whether the State could deny the right to condemn where the property "has *already* been devoted to public use," but whether an *existing* right to condemn can be defeated by a *subsequent* devotion of the property to a public use (see pp. 93-95 of Brief already filed herein on behalf of the plaintiff). We submit that there can be no doubt that no State has authority to authorize or permit any court to defeat an existing right to condemn, duly granted to a corporation by the State, by giving effect to a devotion of the property to a public use subsequently consummated by another corporation (see Point V of our brief).

With reference to the enumeration of the questions discussed in our brief, which will be found at pages 25 and 26 of the defendants' brief, we have already called attention to the fact that the questions numbered *2* and *3* are essentially Federal (*ante,* p. 15). The question numbered *4*

is a part of our contention that the defendants' alleged devotion of the land to a public use, as given effect by the State court, is a subsequent exertion of legislative power which impairs the obligation of the plaintiff's contract, and certainly there can be no doubt that this is a question which it is within the jurisdiction of this court to determine. The questions numbered *5, 6* and *7* are separate elements of our contention that the plaintiff's contract, when properly construed, gives it a vested right to acquire the land in question despite the defendants' present use of it, and of course there is no doubt that the construction of the contract is a question which it is the pre-eminent function of this court to decide (see cases cited at p. 99 of our brief).

We repeat, therefore, that the defendants' bald assertion that "there is not a Federal question in the list" is but an emphatic illustration of the fact that their entire motion proceeds upon a misconception of what a Federal question really is.

Another point to which we wish to direct the very serious consideration of the court is the fact that throughout their entire brief—even when they undertake to enumerate the questions discussed in the plaintiff's brief—*the defendants completely ignore the point that in rendering its decision the State court necessarily gave effect to the Ohio Public Service Commission Act of June 30, 1911.* That point stands admitted upon this motion; for how else can one account for the defendants' failure to refer to it?

III.

The Federal questions control the case, because the necessary effect of the judgment is to deny the asserted Federal right, and the judgment does not rest upon any independent non-Federal ground broad enough to sustain it.

(At this point we request the Court to read pages 20 to 23 of Brief already submitted by us.)

We freely concede the well-settled rule that where a State judgment rests upon an independent non-Federal ground that is sufficient in itself to sustain the judgment, this court will not take jurisdiction even though Federal questions were decided and decided erroneously.

But we emphatically dissent from the theory (which, upon analysis, will be found to form the sole basis of the defendants' argument upon this branch of the motion) that the mere presence of local, non-Federal questions in a case is sufficient to defeat jurisdiction.

In the first place:

In order for the non-Federal question to constitute an "independent" ground sufficient to sustain the judgment, it must be "one which does not necessarily include a determination of the Federal right claimed" (*Giles* v. *Teasley*, 193 U. S., 146, 160, per Mr. Justice DAY); and this court very recently has announced that

> "Where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment *without any decision*

of the other, (*i e.,* the Federal question), our jurisdiction is plain."

Enterprise Irrigation District v. *Farmers' Mut. Canal Co.,* per Mr. Justice VAN DEVANTER, decided March 6, 1917, not yet reported.

If the necessary effect of the judgment is to deny a Federal right or immunity specially set up and claimed, which, if recognized and enforced, would require a different judgment, then this court has jurisdiction and will review the judgment.

Chicago, B. & Q. Ry. v. *Drainage Commissioners,* 200 U. S., 561, 580, 581;
West Chicago R. R. v. *Chicago,* 201 U. S., 506, 519, 520;
Ferris v. *Frohman,* 223 U. S., 424, 431.

And this is true, not only where local questions are merely "in the case," but, also, *where the State court has expressly and in terms based its decision upon the local questions.*

Cases cited, supra.

For State courts cannot accomplish the denial of Federal rights "merely by silence on the Federal question and by placing the judgment on some principle of the common law."

Chicago, B. & Q. Ry. v. *Drainage Com., supra,* at p. 581.

They cannot, by any method, evade the Federal question if it be necessary to a decision; and "of such necessity this court must in each instance decide."

Wood v. *Cheseborough,* 228 U. S., 672, 677, 678, per Mr. Justice MCKENNA.

In *Ferris* v. *Frohman, Chicago, B. & Q. Ry.* v. *Drainage Comm.*, and *West Chicago R. R.* v. *Chicago, supra*, the State courts expressly rested their judgments upon local and non-Federal grounds, and yet this court took jurisdiction in each instance because the necessary effect of the judgment was to deny the asserted Federal right.

Another illustration of this doctrine is *Anderson* v. *Carkins*, 135 U. S., 483. That was a bill for specific performance of a contract which was defended upon the ground that the contract was void under the homestead laws of the United States. The State court decided the case upon *questions of local law* and gave a decree for specific performance. This court held that the necessary effect of this decree was to overrule the defense grounded upon a Federal law and thus, in effect, deny the asserted Federal right. It accordingly took jurisdiction.

This court, therefore, must decide whether, in this case, there is any local or non-Federal question that is not so interwoven with the Federal question as to include a determination of the latter, or, in other words, whether the judgment could have been rendered without denying the asserted Federal right.

In the second place:

Even if the non-Federal question be independent of and not interwoven with the Federal question, its mere presence in the case is not sufficient to show that the judgment rests upon it.

Where an opinion has been delivered the general practice of this court is to look to the opinion to determine the grounds of the decision, and if the opinion actually place the decision upon a

non-Federal ground this court will ordinarily go no further than to ascertain whether such non-Federal ground has fair support in the record, but even in such cases it is recognized that if the non-Federal ground be so certainly unfounded that it properly may be regarded as essentially arbitrary, this court will not allow its jurisdiction to be defeated.

> *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, per Mr. Justice VAN DEVANTER, decided March 6, 1917, not yet reported;
> *Leathe* v. *Thomas*, 207 U. S., 93, 99, per Mr. Justice HOLMES;
> *Garr Scott & Co.* v. *Shannon*, 223 U. S., 468, 471, 473, per Mr. Justice LAMAR.

AND WHERE, AS IN THIS CASE, NO OPINION HAS BEEN DELIVERED, AND IT IS THUS IMPOSSIBLE TO KNOW THE PRECISE GROUND UPON WHICH THE STATE COURT ACTUALLY RESTED ITS JUDGMENT, THIS COURT WILL NOT DECLINE JURISDICTION UNLESS THE NON-FEDERAL GROUND IS A GOOD AND VALID ONE.

This rule was long ago established and never has been relaxed.

In *Neilson* v. *Lagow*, 12 How., 98, 110, it was contended that the court was without jurisdiction because the judgment might have been placed upon a non-Federal ground, and in answer to that contention this court said:

> "We cannot infer that the decision rested on this ground, *because we are of opinion it is not tenable.* If it had appeared affirma-

tively in the record that the Supreme Court did decide that the deed conveyed only a life estate, this court would not inquire into the correctness of that decision; but when put to infer what points may have been raised, and what that court did decide, we cannot infer that they decided wrong; otherwise, nothing would be necessary in any case to prevent this court from reversing an erroneous judgment under the twenty-fifth section of the Judiciary Act, but that counsel should raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon."

The court then proceeded to discuss the correctness of the alleged non-Federal ground *with reference to general authorities,* and, reaching the conclusion that it was unsound, took jurisdiction and reversed the judgment.

In *Maguire* v. *Tyler,* 8 Wall., 650, 664, 665, in answer to an objection to the jurisdiction of the court to hear the case under the 25th section of the Judiciary Act, it was said:

"The respondents do not deny that there are issues in the pleadings involving questions re-examinable in this court under that section of the Judiciary Act; but what they contend is, that the answer presented other defences not re-examinable in this court, and they insist that the Supreme Court of the State, *for aught that appears to the contrary, may have decided the cause* against the plaintiff, and reversed the decree of the Court of Common Pleas *upon some of the defences set up in the answer which are not re-examinable in this court.* Certain it is that Federal

questions are directly involved in the pleadings, and if it appears that none of the other defences *afford any legal answer to the suit*, the conclusion must be that the case is properly here, as *this court will not presume that the court below decided the other issues erroneously in order to defeat their own jurisdiction.*"

In *Klinger* v. *Missouri*, 13 Wall., 257, 263, this court, through Mr. Justice BRADLEY, said:

> "The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground, *and it appears that the court did, in fact, base its judgment on such independent ground* and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. *But where it does not appear on which of the two grounds the judgment was based*, then, *if the independent ground on which it might have been based* WAS A GOOD AND VALID ONE, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; *but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.*"

This statement was repeated and recognized as the law in *Eustis* v. *Bolles*, 150 U. S., 361, 366,

367; and in the recent case of *Adams* v. *Russell*, 229 U. S., 353, 358, which was a writ of error to review a judgment denying a petition for a writ of *habeas corpus*, this court, speaking through Mr. Justice McKenna, said:

> "The petition was denied without opinion and it is left indefinite upon what ground—whether the court entertained views adverse to plaintiff in error's on the Federal questions or whether it considered that its former decision determined his rights; whether, as a matter of procedure, a rehearing was his remedy, or whether the new claim of 'good time' allowance was tenable under the statute. In such situation may we conjecture upon which ground the court decided and by conjecture acquire jurisdiction to review the judgment of the court?
>
> "In *Eustis* v. *Bolles*, 150 U. S., 361, it is decided that when there is a Federal and state question in the case *and the latter is sufficient to sustain the judgment*, this court will not review the judgment, and the logical course is to dismiss the writ of error. But we may be put to infer what points may have been raised and what was decided; in other words, whether the state court rested its decision upon a Federal ground or upon an independent ground. IF THE LATTER BE CONTENDED, THEN IT MUST APPEAR THAT SUCH GROUND WAS A GOOD AND VALID ONE, sufficient to sustain the judgment. *Klinger* v. *Missouri*, 13 Wall., 257, 263. Otherwise, as was said in *Neilson* v. *Lagow*, 12 How., 98, 110, 'counsel might raise on the record some point of local law, however erroneous, and suggest that the court below may have rested its judgment thereon,' and, therefore, *if the*

> *independent ground be not good and valid it will not be presumed that the judgment was based upon it.* See also *Magwire* v. *Tyler,* 8 Wall., 650."

It was further said (p. 361):

> *"The sufficiency of the local question to sustain the judgment rendered,* and the necessity for the determination of the Federal question *necessarily we have to consider."*

In *Johnson* v. *Risk,* 137 U. S., 300, 307, the Court said, per Mr. Chief Justice FULLER:

> "Where there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then *if the independent ground was not a good and valid one,* sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, *we ought not to assume that it proceeded on grounds clearly untenable."*

In that case the non-Federal question related to the proper interpretation and application of the Statnte of Limitations of Tennessee. The State court had delivered no opinion expressing the grounds of its judgment, and this court, in order to determine its jurisdiction, discussed at length the validity of the defense of the Statute of Limitations, not only with reference to prior decisions of the Supreme Court of Tennessee, but also, with reference to authorities in other jurisdictions. In other words, *the court investigated the*

validity of the alleged non-Federal ground of decision and reached its conclusion with respect to its own jurisdiction by determining whether or not the asserted non-Federal ground was "a good and valid one."

In *St. Louis & Iron Mountain Ry.* v. *McWhirter*, 229 U. S., 265, 276, the court seems to have gone even further in the direction of guarding against the defeat of its rightful jurisdiction by silence upon the part of the State courts with respect to the grounds upon which they rest their judgments. In that case it was said, per Mr. Chief Justice WHITE:

> "If as is inferable from the argument, reliance is placed on the ruling of the court below that there was evidence tending to show negligence on the part of the engineer for the purpose of establishing that even if a Federal question was passed upon the case was also decided on an independent non-Federal ground broad enough to sustain the judgment, the proposition is without merit. *The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone, affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect.* But it was long since pointed out in *Neilson* v. *Lagow*, 12 How., 98, the court speaking through Mr. Justice CURTIS, that to admit that the authority to review the action of a state court where it has decided a Federal

> question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion."

If the case last cited be followed, no conjecture can be indulged in and the jurisdiction of this court is beyond question. If the possibility of a decision upon a non-Federal ground be admitted, then the court must determine, not only whether or not there is a local, non-Federal question that is independent of the Federal question, but also, if there be one, then whether or not it is one upon which the judgment can rest, *i. e.*, whether or not it is a "good and valid" ground which would afford a "legal answer to the suit."

A.—There is no independent non-Federal question in the case.

The proceeding was instituted by the plaintiff for the sole purpose of acquiring a parcel of land needed for its enterprise; and the Federal right which it asserts is the *right to acquire* the land, *in invitum*, by an exercise of the power of eminent domain. That right is Federal in character because, as shown in Point II of the brief already filed and as conceded by the defendants upon this motion, it is secured by the plaintiff's charter-contract and is "property" within the meaning of the due process clause of the Federal Constitution.

The judgment under review unquestionably prevents the plaintiff from acquiring the land, and

thus denies the asserted Federal right whatever the process of reasoning by which the State court reached its conclusion. A recognition and enforcement of the asserted Federal right obviously would have produced a different judgment; and upon the authorities already cited we submit that the jurisdiction of this court is clear, regardless of whether the State court placed its decision upon some matter of local or general law or not. Paraphrasing some of the language of Mr. Justice HUGHES in *Ferris* v. *Frohman*, 223 U. S., 424, 431: By the judgment the plaintiff was permanently prevented from acquiring the land in controversy. The decision thus denied to it a Federal right specially set up and claimed under the contract and due process clauses of the United States Constitution. The fact that the court reached this conclusion in favor of the defendants by a consideration of common law principles or questions of local and general law to the exclusion of the Constitution does not alter the effect of the decision. This court, therefore, has jurisdiction.

The defendants insist that the case involved *four* questions, to wit, the plaintiff's corporate existence, its right to make the appropriation, its inability to agree as to the compensation to be paid, and the necessity for the appropriation. The plaintiff's corporate existence was fully proved and has not been challenged either here or in the State court; and the question of its right to make the appropriation is conceded to be Federal (Brief, p. 11). Thus, the so-called "purely local questions" upon which it is claimed the decision may have been based are the inability to

agree as to the compensation to be paid and the necessity for the appropriation (Brief, p. 12).*

Of course, we do not at all dispute that it was incumbent upon the plaintiff to establish its inability to agree as to the compensation to be paid and the necessity for the appropriation. But what is the reason why it was incumbent upon the plaintiff to establish those things? It is not sufficient to answer that the State statute required their proof. Why does the statute make that requirement? Obviously, the reason is that those things are "conditions precedent, prescribed by the legis-

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*The defendants state that there was an additional local question with respect to the sufficiency of the description of the property to be condemned (Brief, pp. 12, 13). That assertion, however, is inadvertent because obviously based upon a misconception of the record.

The question of the sufficiency of the description was specially raised by an oral motion to dismiss the petition, which motion the Probate Court granted (Rec., p. 1). That decision was reviewed in the Court of Common Pleas upon a separate petition in error (Rec., p. 11), and that Court affirmed the judgment of the Probate Court (Rec., p. 12). That judgment was in turn reviewed upon another petition in error filed in the old Circuit Court of Summit County (Rec., p. 13); and that court **reversed** the judgment of the Court of Common Pleas and remanded the cause for trial (Rec., p. 15). In rendering its decision the Circuit Court delivered an opinion (printed in full in the Appendix) from which we quote the following:

> "The only question presented, which, in our view of the case, requires our consideration, is whether the description in the petition of the land sought to be appropriated, is sufficient under the statute * * * We now have both the point of beginning and ending of this one line, which, it is said, is so indefinitely described as to make the description defective in failing to conform to that required by the statute, to wit: a 'specific description.'
>
> "This contention we hold is not sound. * * * This would seem to us to be as 'specific' as it could well be made.
>
> "Entertaining this view, it follows that the judgment of the Probate Court dismissing the petition on the ground that the description was not 'specific' under the statute, and the judgment of the Court of Common Pleas affirming such judgment, must be reversed, and the cause remanded to the Probate Court for further proceedings."

This judgment was in turn affirmed by the Supreme Court of Ohio (**Northern Realty Co. v. Cuyahoga River Power Co.**, 88 Ohio St., 616.)

It is thus apparent that the question as to the sufficiency of the description was conclusively and finally determined in favor of the plaintiff. It is impossible to claim that the adverse judgment now under review is or could be based upon that ground.

lature, to the right of eminent domain or to the exercise of such right" (*P. C. & T. R. R. Co.* v. *Tod,* 72 Ohio St., 156, 166, cited at p. 20 of our brief), and the existence of those conditions precedent must be shown *in order to establish that the plaintiff has the right to acquire the land.* In other words, those things must be shown IN ORDER TO ESTABLISH THE EXISTENCE OF THE IDENTICAL FEDERAL RIGHT WHICH THE PLAINTIFF HERE ASSERTS. Indeed, the power of eminent domain is founded upon and limited by the public *necessity* (*Giesy* v. *Cincinnati, W. & Z. R. R.,* 4 Ohio St., 308, 324, 325), and the four "conditions precedent" enumerated in §11,046 of the Ohio General Code always existed and were necessary to be established even before there was any statute expressly requiring their proof (*Powers* v. *Railway Co.,* 33 Ohio St., 429, per DAY, *J.*).

Approaching the subject from a somewhat different angle, let us put the inquiry: What is there before the court for decision when a corporation presents a petition of the kind presented by the plaintiff in this case? What is the object of the so-called "preliminary hearing"? Obviously, the sole concern of the court is the single ultimate question whether or not the alleged corporation which comes into court seeking to acquire the land of another citizen is a duly constituted agent of the State—clothed by it with legal authority to take the land upon payment of compensation. If it be such, the court has no duty, power, or discretion, but to impanel a jury and assess the amount of the compensation to be paid. It cannot arbitrarily refuse to do this by the device of a finding that the conditions have not been complied with if the evidence really establish such compliance.

We submit that it is perfectly clear, therefore, that although the statute enumerate four preliminary questions, those four are, in reality, but separate elements of the one single ultimate question: *Has the corporation a right to acquire the land?* As put by the defendants' own counsel in their brief in the Court of Common Pleas, the important issue is "the plaintiff's right to make the appropriation, *which really includes each and all the others.*"

And when the four "preliminary questions"—the conditions to the right to exercise the power of eminent domain—are established, what is the result? Clearly the result is that the right to acquire the land exists. In other words, when these conditions are established the existence of the asserted Federal right follows as a necessary consequence. *Proof of compliance with the conditions establishes the Federal right.*

It is thus impossible to say that any of these four conditions or "preliminary questions" is an independent non-Federal matter. They are, indeed, so interwoven with the Federal right that they *actually constitute it*, and a decision upon them cannot be reached without, in effect, deciding the Federal question itself, *i. e.*, without deciding as to the existence of the asserted Federal right.

Perhaps the defendants would answer that, conceding that proof of compliance with the "conditions precedent" establishes the Federal right and that in this sense the four "preliminary questions" are interwoven with and actually constitute the Federal question, yet the determination of whether those conditions have been complied with involves a consideration of questions of fact and

questions of local or general law, and if the State court found the facts and decided the questions of local or general law against the plaintiff this court could not take jurisdiction because it has no power to review a State court's determination upon these latter questions.

But this court, although repeatedly urged to do so, has steadfastly refused to permit the denial of Federal rights in any such manner. It is wholly immaterial whether the issues as to inability to agree and the necessity for the appropriation be regarded as questions of fact, questions of local or general law, or mixed questions of law and fact. For the settled rule is that *whatever is necessary to be determined in order to pass upon the asserted Federal right will be reviewed by this court, whether it be a question of Federal law, a question of local law, a principle of general jurisprudence, or even a contention that a finding of fact has been made without any evidence to support it.**

Thus, in *Carlson* v. *Curtiss*, 234 U. S., 103, 106, it was expressly stated by Mr. Justice PITNEY that a State court could not deprive a litigant of the benefit of a Federal right, either "by omitting to pass upon the basic questions of fact" or "by making findings that were wholly without support in the evidence;" and that if necessary for a decision of a Federal question this court will *examine the evidence*, not only "in order to determine whether there is evidence to support the findings of the State court," but, also, "*in order to determine what facts might reasonably be found*

*In this connection we direct attention to our Eighth Assignment of Error at page 330 of the Record, where it is distinctly set up that the judgment under review is indisputably contrary to the evidence and without any evidence to support it.

therefrom and which would furnish a basis for the asserted Federal right."

In *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S., 655, 668, it was pointed out by Mr. Justice HOLMES that findings "may depend upon questions that are re-examinable here," and that "the admissibility of evidence or *its sufficiency to warrant the conclusion reached* may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court." He further stated that "Such questions properly saved must be answered, and so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined."

In *Creswill* v. *Knights of Pythias*, 225 U. S., 246, 261, Mr. Chief Justice WHITE stated that "Where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision." He stated, also, that "Where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right." And in that case the court did review the findings made by the State court concerning fraudulent purpose, injury to property, deception of the public, etc.

In *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S., 573, 591, Mr. Justice VAN DEVANTER quoted an earlier case as recognizing the principle "where the question is of the competency and *legal effect of the evidence* as bearing upon a question of Federal law the decision may be reviewed by this court." He referred, also, to *Stanley* v. *Schwalby*, 162 U. S., 255, 274, 277-279 (in which this court reversed a judgment of the State court because upon examining the evidence this court was of the opinion that it was wholly insufficient to support the State court's conclusion that an attorney had *notice* of a previous deed) and quoted the following from the opinion of this court in that case:

> "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, WHETHER THAT QUESTION DEPENDS UPON THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES, OR UPON THE LOCAL LAW, OR UPON PRINCIPLES OF GENERAL JURISPRUDENCE."

In *Southern Pacific Co.* v. *Schuyler*, 227 U. S., 601, 611, this court affirmed its power and duty to review the finding of the State court with respect to the status of Schuyler as an interstate passenger—a question which was admitted to be a mixed question of law and fact—because this was necessary in order to determine the existence of the asserted Federal right.

In *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 205 U. S., 1, the State court had denied a right to recover under the Federal Safety Appliance Law

because it found that the deceased was guilty of *contributory negligence.* Yet this court took jurisdiction and re-examined the State court's finding upon that point and reversed the judgment.

In *Gauthier* v. *Morrison,* 232 U. S., 452, 458, the State court held that the asserted Federal right of the plaintiff to settle upon land and remain in possession thereof to the end that he might perform the acts essential to the acquisition of the title under the Homestead Law of the United States *did not exist* because, under its view of a survey of the land in question, the land was not subject to settlement. Yet this court took jurisdiction and reversed the judgment. The court said, per Mr. Justice VAN DEVANTER:

> "Although challenged by the defendants, our jurisdiction does not admit of any doubt. The plaintiff asserted a right to settle upon the land notwithstanding the wrongful act or error of the surveyor in designating and meandering it as a lake, and also a right to remain in possession to the end that he might perform the acts essential to the acquisition of the title, and he expressly predicated these rights upon the homestead law of the United States. The decision was against the rights so claimed, and this brings the case within §709 of the Revised Statutes, now §237 of the Judicial Code."

The analogy between that case and the case at bar is very striking. There, as here, the asserted Federal right consisted of a *right to acquire* title to a parcel of land. There, as here (as assumed by the defendants), the State court denied the right to acquire the land upon a ground which, if considered abstractly and dissociated from its relation to the ultimate Federal right claimed, in-

volved no decision upon a Federal question. Yet on account of the fact that a decision upon the underlying question necessarily controlled the ultimate question as to the existence of the asserted Federal right this court took jurisdiction. It follows that it must do so in the present case.

In *Bowe* v. *Scott*, 233 U. S., 658, 662, 663, the suit was brought to enjoin the enforcement of a municipal ordinance closing an alley. A motion to dismiss was made upon the ground that "as the court below rested its decision upon the *want of right* of the plaintiff to prevent the closing of the alley because such closing was in any event a public wrong which under the circumstances the complainants had no right to redress, the case below was decided upon a State ground which was independent of any assumed assertion of Federal right, and there is hence no jurisdiction." This ground of the motion was held to be untenable, the court saying, per Mr. Chief Justice WHITE:

> "The contention of the complainants was that they had such an interest in the property or were so peculiarly and especially damaged that they had a *right to prevent the closing of the alley* which could not be taken from them without depriving them of their Federal rights. This being true, as it undoubtedly is, it follows that the decision of the court below under the hypothesis stated, amounted to denial of the existence of the Federal rights which were adequately asserted. And from this it follows that the proposition now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied."

Here again is a case identical in principle with the case at bar. The contention of the plaintiff is that it had a right to acquire the land which could not be taken from it without impairing its charter and taking its property without due process of law, *i. e.*, depriving it of its Federal rights; and if it be assumed that the court below "rested its decision upon the want of right of the plaintiff" to acquire the land, its decision necessarily amounts to "a denial of the existence of the Federal rights which were adequately asserted;" and jurisdiction to enforce and protect the asserted Federal right therefore necessarily obtains.

In *Cornell Steamboat Co.* v. *Phoenix Construction Co.*, 233 U. S., 593, 598, 599, the State court expressly rested its judgment upon a concededly Federal ground and also upon the ground of negligence, and a motion to dismiss was made upon the ground that "the second proposition upon which the court based its decision, that is, the happening of the accident solely as the result of the negligent conduct of the Steamboat Company, is an independent State ground broad enough to sustain the judgment without the necessity of considering the Federal question involved in the first proposition." But this view was rejected and the motion to dismiss denied because the question of negligence was *necessarily intermingled with the elements necessary to be considered to determine the Federal right.* The court said, per Mr. Chief Justice WHITE:

> "It is indeed true that the fact of negligence in and of itself abstractly considered may be a state question concerning which we would accept, and indeed it may be conceded

> would be bound by the conclusion of the state court. But when negligence involves and concerns a subject of Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler,* 227 U. S., 601, 612."

In view of these authorities there can be no doubt that the questions of inability to agree and necessity for the appropriation are, as stated at page 20 of our first brief, "mere premises from which the existence of the asserted Federal right is to be deduced." And even if their determination involve a consideration of questions of fact and of local or general law, that would not cause them to be unexaminable here. (See, particularly, *Kansas City So. Ry.* v. *Albers Commission Co.,* cited *supra.*)

Recurring to the language of Mr. Justice VAN DEVANTER in *Enterprise Irrigation District* v. *Farmers Mut. Canal Co.,* already quoted, the non-Federal questions are so interwoven with the Federal question that they are not independent matters and any decision that might be reached upon them necessarily involves a decision of the Federal question. The jurisdiction of this court is consequently clear.

Indeed, if it were held that this court has no jurisdiction because the determination of the existence of the asserted Federal right involves an inquiry into the facts and an application of the principles of general law to those facts, scarcely any case could be brought here from the State courts. For it is rare indeed that a contro-

versy arises in a State court which does not involve a determination of the legal effect of facts and depend, to some extent at least, upon principles of general jurisprudence.

It may be added, too, that, so far as can be discovered by a careful examination, in each of the cases in which this court has declined to take jurisdiction because the judgment rested upon an independent non-Federal ground broad enough to sustain it, the situation has been such that *conceding the existence of the Federal right* the plaintiff was nevertheless unable to enforce it because of some intervening cause that gave rise to an affirmative defense—such as laches, *res adjudicata*, statute of limitations, or estoppel. Of course we do not mean that this enumeration is necessarily exhaustive, but we do mean that in each case there was some element unconnected with the bare existence of the Federal right. In the case at bar the situation is entirely different. One cannot concede the existence of the plaintiff's asserted contract and property right to acquire the land without conceding that the judgment must be reversed.

What the defendants' argument thus really amounts to is, not that *conceding the existence of the asserted Federal right* the judgment may yet be sustained upon some other ground, but that *the State Court may have held that the Federal right never existed* because the plaintiff did not show inability to agree or the necessity for the appropriation. "And from this it follows that the proposition now relied upon when rightly considered comes to this, that jurisdiction to enforce and protect a Federal right obtains in no case where such Federal right has been denied."*

*Mr. Chief Justice White in **Bowe v. Scott**, 233 U. S., 658, 662, 663.

This is clearly a case in which this court has the power and the duty to take jurisdiction and *examine the record* and by passing upon "the legal effect of the evidence" determine "what facts might reasonably be found therefrom which would furnish a basis for the asserted Federal right."

B.—The judgment does not rest upon any of the so-called local questions.

Assuming now, for the sake of the argument, that the issues as to inability to agree and necessity for the appropriation are separate, independent, non-Federal questions, we proceed to show the judgment does not rest upon them.

It is a significant fact that the defendants do not undertake to say that the State court *did* decide the case upon these questions. They say that the decision "*may have been*" based upon them (Brief, p. 17) and that the record gives "reasonably satisfactory evidence" that it was (id., p. 18). But they fail to give any reference to any part of the record to substantiate the statement; and they concede the possibility of the decision having been based upon the Federal question. In short, they plant themselves squarely upon the proposition that

> "It is *not necessary that the record should show that the decision of the State court is based upon a purely local question* in order to establish that this court will not take jurisdiction" (Brief, p. 18).

As already shown, however, that proposition is not correct.

We respectfully urge that the statement by

Mr. Chief Justice WHITE in *St. Louis & Iron Mt. Ry.* v. *McWhirter, supra,* embodies the true rule to be applied in those cases in which the silence of the State court creates uncertainty with respect to the actual ground upon which the judgment is based.

But whether the court follow that rule (*i. e.,* whether it absolutely refuse to conjecture that because there may have been a potentiality of considering the case from a non-Federal point of view therefore it was considered and decided in that aspect), or whether it test its jurisdiction in the manner in which it was tested in *Johnson* v. *Risk* and the other cases cited above, (*i. e.* by examining the *merits* of the non-Federal question), the result in this case will be the same. For in the present case the record clearly shows that the alleged non-Federal grounds are *not* "good and valid," and, indeed, even demonstrates that the so-called "local questions" are so clearly frivolous, untenable, and devoid of merit, as to make it impossible to assume that the State court rested its judgment upon them, without, by the same token, showing that the judgment is "essentially arbitrary."

Inability to Agree.—The defendants do not even assert that there was any merit in the claim that inability to agree was not shown. They state their position upon this point as follows (Brief, p. 12):

> "Plaintiff undertook to prove that there had been negotiations for the purchase of the property before it commenced its proceedings to condemn and to show that it had been unable to agree with the owner of the property in regard to the compensation to be paid. Defendants *endeavored to prove* that

> plaintiff had been *negotiating with the wrong parties,* that they were fully advised that the property was owned by the Northern Ohio Traction and Light Company but failed to show any satisfactory evidence of inability to agree in regard to the compensation to be paid with *any agents or representatives of that company.*"

The uncontradicted and undisputed evidence, however, clearly shows that the plaintiff actually negotiated for the property with *certain individuals who were officers of* BOTH OF THE DEFENDANTS *and held themselves out as having "the matter in hand for selling the property";* and there is no dispute about the fact that these individuals expressly refused the plaintiff's offers and *stated that the property was not for sale and would not be parted with at any price* (Rec., pp. 45-47, 53, 54. See, also, pages 14 and 25 of our brief). Nor is there any suggestion that these individuals were not fully and duly authorized to speak for BOTH CORPORATIONS.

The contention that the plaintiff had been "negotiating with the wrong parties" (by which it is meant that the plaintiff negotiated with the defendant *Realty* Company while the property was "owned" by the defendant *Traction* Company) is thus entirely untenable.

It is true that certain written offers were addressed to the Realty Company (Rec., pp. 199, 200), which offers were before Mr. Bacon (the plaintiff's agent) and Mr. Christy (President of the Realty Company) at the time they discussed the proposed purchase and sale (Rec., p. 49). But *before these negotiations were taken up*

with Mr. Christy, the plaintiff's agent (Mr. Bacon) had discussed the matter with Mr. Currie, *Vice-President and General Manager of the Traction Company* (Rec., p. 75), and asked him "whether or not they would sell that property that we had been talking about" (which, as appears at page 45 of the record, was indicated by reference to the property described in the former case—mentioned at page 11 of our brief —and which is identical with the property described in the petition in this case) and Mr. Currie said "nothing doing, or something to that effect" (Rec., p. 46). Then, after some further talk, Mr. Currie said, "If you don't believe me see Mr. Christy" (Rec., p. 46). *It was then that the negotiations were taken up with Mr. Christy—that is, after the Traction Company's Vice-President and General Manager had referred the plaintiff's agent to Mr. Christy.* And although Mr. Currie was called to the witness stand as a witness for the defendants (Rec., pp. 75-79) he was not asked a single question with respect to his conversation with Mr. Bacon and did not in any way contradict what Mr. Bacon had testified that he had said. Mr. Christy was not called to the stand at all.

Upon a familiar principle, the Traction Company would be bound by whatever Mr. Christy said to Mr. Bacon, even though Mr. Christy were not an officer of and had no official connection with the Traction Company, because the plaintiff's agent who was conducting the negotiation was expressly and directly referred to him by the Traction Company's Vice-President and General Manager.

But aside from this, *Mr. Christy was an officer of the Traction Company, also, to wit: a Vice-President of it*, and it is manifestly absurd for the defendants to attempt to distinguish between what Mr. Christy said to Mr. Bacon as President of the Realty Company and what he said to Mr. Bacon as Vice-President of the Traction Company. It is equally absurd to say that, when a negotiation for the purchase of property is undertaken with a man who is an officer of each of two corporations having common officers and the stock of one of which is owned by the other (Rec., pp. 210, 54, 114, 283) and that man says the property is "not for sale" and will not be parted with at any price, and that "he would not entertain any proposition for the purchase of it" (Rec., pp. 46, 54), there has been "no negotiation" and "no inability to agree" with that one of the two corporations which is now claimed to have been the owner of the property. Mr. Christy did not refuse to negotiate with Mr. Bacon because he (Christy) was not authorized to speak for "the owner," but because "they would not part with the property at any price" (Rec., p. 46), and it would be the extreme of *finesse* to say, as the defendants must in order to sustain their position, that his voice was the vioce of the Realty Company and that when he spoke the Traction Company did not hear what he said.

In addition to the negotiations just mentioned, the record as a whole (particularly the testimony of Mr. Bacon) shows that numerous efforts had been made to secure the land for the present plaintiff for several years preceding the institution of this suit. The defendant Traction Company had definite and

precise notice and knowledge of the property which was wanted, not only because of Mr. Bacon's numerous communications and conferences with its officers, but, also, because it had been made a party to the prior proceeding for the acquisition of this land along with other parcels, which is referred to on pages 11 and 12 of our brief (see Rec., pp. 48-51, 227-230, 129-130).

The plain purpose of the statute in requiring proof of inability to agree is to prevent a corporation from haling the land-owner into court without giving him an opportunity to agree on the compensation which he is to receive for his land if he be actually willing to sell at a price which the corporation is willing to pay—that is, "give the owner an opportunity to sell his property to the corporation and thus save him the trouble and cost incident to an appropriation proceeding should an agreement be reached."

Louisville &c. R. Co. v. *Cincinnati*, 10 Ohio N. P., (N. S.) 649, 655.

In the present case each of the defendants had ample notice of the plaintiff's desire to acquire the land and ample invitation and opportunity to come to an agreement with it as to the amount of the compensation if either of them really desired to do so. The real object and purpose of the statute obviously was accomplished.

It consequently follows that even though it be assumed that the Traction Company's very precarious and attenuated claim that it was "the owner" was sustained, the various letters to it and the conferences had by Mr. Bacon and particularly the oral negotiations which were actually

had with Mr. Currie and Mr. Christy amply establish the plaintiff's inability to agree with it. Indeed, when Mr. Currie said "nothing doing" all chance of the plaintiff's getting the land, save by resort to an appropriation proceeding, was absolutely and finally removed. The refusal of the Traction Company to sell, the plaintiff's "inability to agree" with it, was then complete and final.

Moreover, the Traction Company, after voluntarily making itself a party to the case, at once challenged the right of the plaintiff to acquire the property upon grounds wholly unconnected with any question of agreement as to the price (Rec., p. 20). It is a general rule that where the owner denies the right of the corporation to take the property no attempt to agree with him as to the price need be made.

Lewis, Eminent Domain, §499.

And this rule is of controlling force here, because, contrary to the notion apparently entertained by the defendants, the Ohio statute does not require *negotiation.* It merely requires "inability to agree," which, of course, may exist even though no negotiation be had.* Where, as here, an owner assumes an attitude hostile to the proposed improvement and takes the position that his land is not subject to appropriation because it is required for an inconsistent public use, "inability to agree" is clearly shown even though there was no negotiation whatever. In brief, as was said in *Toledo Consol. St. Ry Co.* v. *Toledo*

*Under a New York statute that authorized condemnation proceedings when the Corporation is "unable to agree" a proceeding was sustained without any negotiation whatever because of uncertainty as to the title. The Court said: "The spirit of the statute is to require the plaintiff to keep out of court if it reasonably can, but to permit it to resort to the court when it reasonably ought." (Stillwater &c. R. Co. v. Slade, 36 N. Y., App. Div., 587, 593).

Elec. St. Ry. Co., 6 Ohio Cir. Ct., 362, 388, 389, the record is "permeated and saturated with evidence of the fact that it was impossible for these contesting companies to agree" because there was "a radical and irreconcilable difference of opinion—*an irrepressible conflict*—so to speak." One was seeking to get the land for one public use. The other was asserting that it was "required" and was "being utilized" for another public use and that the plaintiff's proposed use was "entirely destructive of and inconsistent with" the use asserted by the Traction Company; (Rec., p. 20) and that was its contention throughout the case. Agreement was impossible. And in determining whether "inability to agree" was shown, the court must "look to the whole record" (case last cited).

In addition to all this, the statute does not in all cases require a showing of inability to agree *with the owner*. The language of the statute is:

> "Appropriations can be made only when the corporation is unable to agree with the owner, OR HIS GUARDIAN OR TRUSTEE, as to the compensation to be paid for the property or easement or interest therein, sought to be appropriated, or when the owner is incapable of contracting in person or by agent, and has no guardian or trustee, or is unknown, or his residence is beyond the state, or unknown."
>
> *Ohio General Code*, Sec., 11039.

If, as asserted by the defendants' counsel upon the hearing, the Realty Company and "all of the original holders of this property were *trustees for The Northern Ohio Traction and Light Com-*

pany" (Rec., pp. 57, 151, 232), obviously a negotiation by the plaintiff with the Realty Company was sufficient as to the Traction Company also.

At page 151 it was expressly stated that the property was of a "trust character," and at page 232 the defendants' object in putting the Realty Company's charter in evidence was stated to be "for the purpose of showing that corporation acts *as trustee* for another only." Again, it was testified at page 73 that the Realty Company was "organized for the purpose of handling property that is not in daily operation in connection with the Traction Company." According to these claims, the express language of the statute conclusively shows that negotiation with the Traction Company was unnecessary.

The entire contention that the plaintiff failed to show inability to agree is a mere *quibble* based upon a question of "ownership" as between two corporations having common officers, one of which was brought into being and the stock of which is owned by the other (Rec., pp. 210, 54, 114, 283). The two together concededly represent the entire ownership, legal and equitable, and both of them are defendants in this case.

Necessity for the Appropriation.—The suggestion now advanced that the State court may have rested its decision upon the ground that such necessity was not shown is really foreclosed and precluded by the fact that *the defendants did not in any way raise or present that question in the motion to dismiss which was made at the close of the trial* (See Record, p. 232; Defts'. Brief, p. 9). The defendants made no motion whatever to dismiss the proceeding at the close of the plaintiff's case—thereby conceding that upon its own evi-

dence the plaintiff was clearly entitled to prevail —and not having themselves introduced any evidence upon the subject or included the question in the motion to dismiss at the close of the whole case, the question was not even conceivably open for decision in the State court. It was not preserved or saved by any motion, request, or exception whatever.

But entirely aside from this, the statements contained in the defendants' brief upon this motion conclusively demonstrate the necessity. At page 15 it is stated:

> "The development under this plan *will, of course, damage this property, for it will deprive it of the ordinary flow of the river.* No water will come below the Gaylord dam except the seepage through the dam and in times of high water."

Again, at page 24, it is stated:

> "If defendants are willing to forego *their right to enjoin plaintiff from consummating this plan* on the ground that under the statutes of the state plaintiff has no right to divert the water of the river in the way contemplated by the plan, plaintiff, instead of needing any of the defendants' property, *would be under the burden of paying damages to defendants for depriving them of the ordinary flow of the river.*"

Thus it is plainly admitted that the plaintiff's plans cannot be carried out without damaging the defendants' property to the extent of substantially entirely depriving it of water—that is, without taking the water which is appurtenant to the land. It is further asserted, in effect, that,

by reason of the fact that the consummation of the plan would damage the defendants' land, the defendants would have a right to enjoin the plaintiff from proceeding. The defendants do not say they *would* forego this right, but even if they did they assert that the plaintiff would yet be "under the burden of paying damages to the defendants for depriving them of the ordinary flow of the river." *In other words, the situation is such that if the plaintiff went ahead without acquiring the defendants' land it would be immediately stopped by an injunction;* and it is in recognition of this fact that the present proceeding was instituted *for the very purpose of assessing the defendants' damages, paying the same to them, and thus placing the plaintiff in a situation where it can go ahead with the construction of its plant.*

We repeat, too, that the indispensability of the land was clearly established by evidence (See pp. 14, 24 and 25 of our brief, and pages of the record there mentioned), *which evidence the defendants made no attempt whatever to controvert.*

A stronger and clearer case of necessity can scarcely be imagined, and for this reason, as well as for the others already mentioned, it is impossible to say that the State court rested its judgment upon the ground that necessity had not been shown.

IN CONCLUSION, we draw attention to the fact that the record as a whole shows that the one great question which dominated the case from beginning to end was the Traction Company's assertion that the plaintiff could not acquire the land because of the devotion of it to a public use which was claimed to have been brought about by

the Traction Company's "dummy," The Northern Ohio Power Company. That was the defense distinctly stated at the opening of the case; that was the question to which the defendants' evidence was addressed; and that was the question which was really presented in the arguments. The formal "preliminary questions" were practically conceded. The question of inability to agree, while formally preserved by the oral motion made at the close of the trial, was a mere "makeweight" of no serious importance.

To say that the judgment rests upon the so-called "local questions" would convict the State court of having deliberately evaded the real question in the case and rendered an arbitrary decision as "a mere device to prevent a review" or "evade the jurisdiction of this court." If that be the situation, then the jurisdiction of this court is just as clear and plain as if the State court had actually rested its judgment upon the Federal question (*Enterprise Irrigation District* v. *Farmers' Mutual Canal Co., supra*).

We ask that the motion be denied. If not denied now, its consideration should be postponed until the oral argument.

Respectfully submitted,

WILLIAM Z. DAVIS,
JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

April, 1917.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 342

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

against

THE NORTHERN REALTY COMPANY AND THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

MOTION TO DISPENSE WITH PRINTING AN EXHIBIT, AND NOTICE THEREOF.

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

CHAS. P. YOUNG CO., PRINTERS, 19 Beaver St., N. Y.

Supreme Court of the United States,

OCTOBER TERM—1916.

THE CUYAHOGA RIVER POWER COMPANY, *Plaintiff-in-Error,* *against* THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY, *Defendants-in-Error.*	No. 342.

Motion to Dispense with Printing an Exhibit.

Now comes the above named plaintiff-in-error and moves the court for an order dispensing with the printing of Plaintiff's Exhibit 1 attached to the deposition of Daniel R. Bacon.

The following is a brief statement of the facts and matters involved and of the reasons for this application.

This case comes here upon a writ of error to the Court of Appeals of the State of Ohio, Eighth District. That court does not require that the records in cases brought before it be printed. In consequence of this fact the record of this case as filed in this court is in manuscript form and no printed copies are in existence. The Clerk of this court has estimated the cost of printing the record at $1,220, and the Clerk's fees at $380.

Included in the estimate of $1,220 as the cost of printing the record is the following item: Maps $479.

The maps which make up the bulk of this item are two large maps showing the project of the Cuyahoga River Power Company. The maps are attached to the deposition of Daniel R. Bacon and are marked respectively "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2." The nature and relation of these maps are fully shown in the following excerpt from the deposition of Mr. Bacon, which forms a part of the record in this case:

> "Q. Aside from a personal examination of the premises, have you made any other examination or study of the project of the Cuyahoga River Power Company? A. Yes.
>
> "Q. And by what means? A. By means of the topographical maps of the section.
>
> "Q. In speaking of the topographical maps of the section, what maps do you have reference to? A. The United States government geological survey topographical sheets.
>
> "Q. Those topographical sheets, what do you know as to their accuracy? A. They are considered accurate for all preliminary work, within ten per cent.
>
> "Q. Have you assembled any of the topographical publications of the Geological Survey with a view of getting the project of the Cuyahoga River Power Company? A. Yes.
>
> "Q. Have you such a map as that, such an assembled map? A. Yes.
>
> "Q. Will you kindly produce it for us?
>
> Maps offered marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2.
>
> "Q. I now direct your attention to the map marked Plaintiff's Exhibit No. 1 and identi-

fied by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether this is the map you have reference to in your last answer? A. Yes.

"Q. State whether or not this series of maps covers the region involved within the project of the Cuyahoga River Power plant as you have stated? A. Yes.

"Q. Are you willing to have that map attached to your deposition and made a part of it? A. Yes.

This is accordingly done.

"Q. I now direct your attention to the map marked Plaintiff's Exhibit No. 2, identified further by the signature of Jessie MacLardy, notary public, under date of March 13, 1914, and ask you whether you have examined this map? A. Yes.

"Q. Are you able to state what if any relation there is between this map and the previous map marked Exhibit No. 1? A. This map appears to be a tracing covering only the essential features of the development of the Cuyahoga River Power Company project.

"Q. Have you examined this map sufficiently so that you are able to state whether or not it is a tracing, whether it is on the same scale? A. It is on the same scale.

"Q. And have you examined it sufficiently so that you know it is a tracing of a portion of the topographical maps? A. Yes.

"Q. Are you willing to have this map attached to your deposition and made a part of it? A. Yes.

This was accordingly done.

"Q. The map Exhibit No. 2—state whether or not that shows any matters which are not

shown on the topographical maps, and in general what does it show in that respects? A. It shows the location of the dams and pipe lines and canals and more in detail the reservoir sites than shown on the topographical map."

The plaintiff-in-error already has and will furnish to the Clerk for insertion in the record of this case a sufficient number of copies of Plaintiff's Exhibit 2; but the plaintiff-in-error has no copies of Plaintiff's Exhibit 1. In order, therefore, to save the large expense of making a plate from which to print Plaintiff's Exhibit 1, and in order to avoid the duplication of exhibits, the plaintiff-in-error asks that the printing of Plaintiff's Exhibit 1 be dispensed with.

The plaintiff-in-error submits that the printing of Exhibit 1 will not be of any assistance to the court in determining the issues in the case, in view of the fact that Exhibit 2 is substantially a duplicate, and that printing of the same is thus a useless expense.

In addition to this, the originals of both maps are now on file in this court as a part of the transcript of record, and are thus available for inspection if such inspection should become desirable for any reason.

Respectfully submitted,

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error.

Sir:

Please Take Notice that the plaintiff-in-error, The Cuyahoga River Power Company, will sub-

mit the foregoing motion to the Supreme Court of the United States at a Stated Term thereof on Monday, December 18th, 1916, at the Capitol, in the City of Washington, D. C., at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated, New York, November 25, 1916.

Yours, etc.,

JOHN L. WELLS,
CARROLL G. WALTER,
Counsel for Plaintiff-in-Error,
120 Broadway,
New York,
N. Y.

To
S. H. TOLLES, ESQ.,
Counsel for Defendants-in-Error,
Williamson Building,
Cleveland, Ohio.

Supreme Court, U. S.
FILED
APR 16 1917
JAMES D. MAHER
CLERK

No. 342.

OCTOBER TERM, 1916.

IN THE Supreme Court of the United States

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

AGAINST

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS-IN-ERROR SUR MOTION TO DISMISS.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants-in-Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

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Supreme Court of the United States.

OCTOBER TERM, 1916. No. 342.

The Cuyahoga River Power Company, Plaintiff in Error,

vs.

The Northern Realty Company and The Northern Ohio Traction and Light Company.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT.

Now comes The Northern Realty Company and The Northern Ohio Traction and Light Company, by counsel appearing in their behalf, and move this Honorable Court:

First.—To dismiss the writ of error herein for the following reasons, to-wit:—

(*a*) This Court has no jurisdiction because the writ of error was directed to the Court of Appeals of Summit County, Ohio, instead of to the Supreme Court of that State.

(*b*) This Court has no jurisdiction because the alleged federal question did not control the decision of the State Court.

(*c*) This Court has no jurisdiction because no federal question is involved in the case.

Second.—To affirm the judgment of the Court of Appeals of Summit County, State of Ohio, on the ground that it was manifestly correct and this writ of error was taken for delay only and the questions upon which it is claimed

the jurisdiction of this cause depend are so frivolous as not to require further argument.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error.

To William C. Davis, John L. Wells, Carroll G. Walter.

Please take notice that on the 16th day of April, A. D. 1917, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for a decision of the Court thereon. Annexed hereto is a copy of our brief of argument in support of said motion.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error

BRIEF ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

Statement of Case.

The Cuyahoga River Power Company, plaintiff in error, is a corporation organized under the General Incorporation Act of the State of Ohio to construct and operate a hydro-electric plant on the Cuyahoga River between certain specified points. The Ohio statutes contemplate the development of the water powers in the rivers and streams of the State and authorize the organization of corporations with the right of eminent domain to acquire such properties and rights as may be needed for their corporate purposes. This company, by its charter, designated a substantial portion of the valley of the Cuyahoga River as its field of operations. It claims that by designating this portion of the Cuyahoga River, which it wrote into its charter at its own will, it acquired the right to condemn for its purposes any lands lying within this location. A look at the maps opposite page 304 of the record shows that this territory in-

cludes the populous village of Cuyahoga Falls. The property of defendants, which the Power Company is attempting to condemn in this suit, lies in the valley of the Cuyahoga River within the points designated.

The case was tried in the Court of Common Pleas of Summit County. The issues were the several issues for which the Ohio statute regulating condemnation proceedings of this kind provides, that is,

1. The existence of the corporation.

2. The right to make the appropriation.

3. Inability to agree as to the compensation to be paid, and

4. The necessity for the appropriation.

On these issues the Court of Common Pleas rendered judgment in favor of defendants in error. By writ of error the case was taken to the Court of Appeals of Summit County, which affirmed the judgment of the Common Pleas. Plaintiff in error then filed a motion in the Supreme Court of Ohio for an order to direct the Court of Appeals to certify its record to the Supreme Court on the theory that the case was one of public interest and of great general interest. This petition presented certain constitutional questions and thereafter plaintiff in error, evidently being advised that if these constitutional questions were in fact involved in the case, it had a right to a writ of error from the Supreme Court, prepared and filed its petition in error in that Court.

Defendant in error filed a motion in the Supreme Court of Ohio to dismiss this petition in error on the ground that the Court was without jurisdiction, as the case did not involve any question arising under the Constitution of Ohio or the Constitution of the United States. The Supreme Court of Ohio sustained that motion and dismissed the petition in error. Thereupon plaintiff in error sued out its writ of error from this Court to the Court of Appeals of Summit County, the intermediate Appellate Court.

Plaintiff in error has been plaintiff in every stage of this case, and will be hereinafter called plaintiff, and defendant in error will be called defendant.

I.

THIS COURT HAS NO JURISDICTION BECAUSE THE WRIT OF ERROR WAS DIRECTED TO THE COURT OF APPEALS OF SUMMIT COUNTY, OHIO, INSTEAD OF TO THE SUPREME COURT OF THAT STATE.

Under Section 237 of the Judicial Code the State Court to which the writ of error should be directed is "the highest Court of the State in which a decision in the suit could be heard." Under the Constitution of the State of Ohio, Article 4, Sections 2 and 6, the highest Court of that State in "cases involving questions arising under the Constitution of the United States or of this State" is the Supreme Court. The Supreme Court of Ohio passed upon this case. In order to determine the nature of the action taken by that Court and following the rule laid down in Norfolk and S Turnpike Co. *vs.* Virginia, 225 U. S. 265, we turn to the order entered in the case by that Court. It reads as follows:—

"661. Supreme Court of the State of Ohio, of the Term of January, A. D., 1915.

Towit: Tuesday, March 23rd.

STATE OF OHIO,
CITY OF COLUMBUS:

No. 14803.

The Cuyahoga River Power Company

vs.

The Northern Realty Company and The Northern Ohio Traction and Light Company.

ERROR TO THE COURT OF APPEALS, SUMMIT COUNTY.

This cause came on to be heard upon the motion of the plaintiff, The Cuyahoga River Power Company, for an order directing the Court of Appeals of Sum-

mit County to certify its record in the above entitled case to the Supreme Court of Ohio for review, for reasons stated in said motion; and it appearing that said plaintiff claims in said motion that said record involves questions arising under the Constitution of the State of Ohio and the Constitution of the United States, the said plaintiff filed in this Court its petition in error in said case as a matter of right, according to the practice of this court; and thereupon this cause came on to be heard on the motion of the defendants to dismiss said petition in error on the ground that said cause does not involve any question arising under the constitution of Ohio or the Constitution of the United States, and that the same is not a case of public or great general interest, together with said motion of plaintiff for an order directing the said Court of Appeals to certify its record in said cause to this Court for review, and said motions were argued by counsel and submitted to the Court and the Court having considered the same does find that this Court is without jurisdiction in the premises, said cause being neither one of public or great general interest, nor does it involve any question arising under the Constitution of the United States or the State of Ohio.

It is, therefore, ordered and adjudged that said motion to dismiss said petition in error be, and it is hereby, sustained, and said petition in error is dismissed; and that the said motion to direct the Court of Appeals to certify its record to this Court be, and it is hereby, overruled.

It is further ordered that defendants in error recover from plaintiff in error their costs herein, expended, taxed at $."

This order shows that plaintiff filed in the Supreme Court of Ohio its petition in error as a matter of right according to the practice of the Court and that the case was heard on motion to dismiss this petition on the ground that no constitutional question was presented and that this motion was

argued and considered by the Court, which found that it was without jurisdiction as the case does not involve any constitutional question, and thereupon dismissed the petition.

We are not unmindful of the rule laid down in Norfolk & S. Turnpike Co. *vs.* Virginia, 225 U. S. 265, which is that

> "where a writ of error is prosecuted to an alleged judgment or a decree of a Court of last resort of a State, declining to allow a writ of error to or an appeal from a lower State Court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the Court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the Crovo case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the State Court has expressed its action."

We appreciate that the Supreme Court of Ohio did not affirm in express terms the judgment of the Court of Appeals and also that the Supreme Court did not exercise its jurisdiction to review the entire case upon the merits, but only to review that part of the case which relates to the claim that constitutional questions are involved. On the other hand, it seems reasonably clear that this case does not come within the scope of the above rule. The Supreme Court of Ohio did not decline to allow a writ of error to the Court of Appeals, in fact, the Supreme Court had no discretion in that regard. The writ of error was filed as a matter of right. This differentiates the case from Gregory *vs.* McVeagh, 90 U. S. 294; Western Union Tel. Co. *vs.* Crovo, 220 U. S. 366; N. & S. Turnpike Co. *vs.* Virginia, 225 U. S. 265; Stratton *vs.* Stratton, 239 U. S. 55, and C. C. C. St. L. R. Co. *vs.* Dettelbach, 239 U. S. 589.

Nor is there any ambiguity created by the form in which the State Court has expressed its action. That Court, after

the case was docketed and a motion to dismiss on the ground that no constitutional question was presented was filed, called the case for argument, heard argument and sustained the motion. This action is clear, concise and not ambiguous. Plaintiff is aggrieved by that order, not because the Court refused to consider its case, but because that Court in considering its case determined that no question was involved arising under the Constitution of the United States. If in that judgment the Supreme Court of Ohio was right, this Court has not jurisdiction. It is that judgment that plaintiff in error should ask to have reversed.

In Missouri K. & T. Rwy. Co. *vs.* Elliott, 184 U. S. 530, the decision to the effect that the writ of error was properly directed to the lower State Court rather than to the Supreme Court of Missouri was based upon the peculiar language of the Missouri Constitution.

In Western Union Tel. Co. *vs.* Hughes, 203 U. S. 505, the decision to the effect that the writ of error directed to the Supreme Court of Virginia must be dismissed on the ground that it should have been directed to the lower Court must necessarily have been affected by the journal entry of the Supreme Court of Appeals to the effect "that the writ or error was improvidently awarded," which naturally implied that the Court had jurisdiction to entertain the writ or not in its discretion.

In Valley S. S. Co. *vs.* Wattawa, 241 U. S. 642, the writ of error was directed to the Supreme Court of Ohio and was dismissed by this Court for want of jurisdiction. The Supreme Court of Ohio had dismissed the writ of error filed in that Court, directed to the lower State Court, but it did not specify its reason for so doing. This Court dismissed the writ "for want of jurisdiction upon the authority of Western Union Tel. Co. *vs.* Crovo, 220 U. S. 364; Norfolk & S. Turnpike Co. *vs.* Virginia, 225 U. S. 264, and Stratton *vs.* Stratton, 239 U. S. 55." In these three cases the question involved was whether the Court of last resort of the State had dismissed the writ in the exercise of a dis-

cretion. This must have been the bass for the dismissal of the writ in the Wattawa case by the Supreme Court of Ohio and on that account, under the rule laid down in the Norfolk Turnpike case, *supra*, the writ of error from this Court should have been directed to the State Circuit Court of Appeals.

Under the laws of Ohio the Supreme Court of that State is the highest Court in cases involving constitutional questions. That Court must take jurisdiction of all such cases. It has no discretion to decline or reject a writ of error directed to a lower State Court. This case was docketed in the Supreme Court of Ohio and that Court heard and determined the very question which this Court must decide on this motion to dismiss for want of jurisdiction, towit, is a constitutional question involved. The Supreme Court of Ohio decided that question against the plaintiff and plaintiff should sue in this Court to reverse the order of the Supreme Court of Ohio and should have directed his writ of error to that Court.

II.

THIS COURT HAS NO JURISDICTION BECAUSE THE ALLEGED FEDERAL QUESTION DID NOT CONTROL THE DECISION OF THE STATE COURT.

There is no dispute in regard to the issues that were presented to the trial Court. In the brief filed for plaintiff, page 5, the statement is made that the following questions specified in the statute were heard and determined, viz:—

"1. The existence of the corporation.

"2. Its right to make the appropriation.

"3. Its inability to agree as to the compensation to be paid for the property.

"4. The necessity for the appropriation."

The statute referred to is Ohio General Code, Sections 11039-11046.

On page 14 of this brief we find:—

> "The case came on for hearing in that Court upon the four preliminary questions, mentioned above, on March 20th, 1914."

Counsel for plaintiff makes much of the statement made by counsel for the defendants upon the opening of the trial (Record, page 20) to the effect that the defence was based upon the proposition that the property is owned by the defendant, a public service corporation, and that the plaintiff seeks to destroy the use for which the property was acquired and for which it has been developed and was at the time being utilized by the owner. It is true that that was one of the defences, but, as the trial progressed, it was evident that the plaintiff was having great difficulty in presenting proper proofs on the points mentioned above which are conditions precedent to its right to condemn, even assuming that it had that right. At the end of the trial, counsel for defendants made the following statement (Record, page 232):—

> "MR. MATHER:—The defendant moves the Court that the plaintiff's petition in this proceeding be dismissed for the reason that there is no evidence proving that there was any attempt or failure to agree with the owner of the property before beginning the proceeding for the appropriation of the property described in the petition, and that the plaintiff has no right to appropriate the property described in the petition.
>
> THE COURT:—That raises the whole issue. This motion will be ruled on after the briefs in the case have been submitted. I will reserve a ruling on the motion until after the briefs in the case have been submitted and the Court has had an opportunity to study the same. * * *
>
> And thereupon counsel for plaintiff and counsel for defendant submitted to the Court their briefs and the Court upon consideration of the evidence and the briefs of counsel on the 1st day of May, A. D. 1914, decided

upon the issue as submitted in said cause in favor of the defendant, to which decision of the Court the plaintiff then and there duly excepted, all of which more fully appears of record in said case."

Plaintiff filed its petition in error in the Court of Appeals (Record, pages 308-310) and with the petition filed a transcript of the docket and journal entries (Record, pages 306-307). Among these entries is the following:—

"May 1st, A. D. 1914. April Term. This cause came on to be heard upon the pleadings, evidence and exhibits and was argued by counsel and submitted to the Court, whereupon the Court finds the issues in favor of the defendant and against the plaintiff."

In its petition in error filed in the Court of Appeals plaintiff assigns various errors, including the constitutional questions upon which it relies and also the following:—

"*First.*—Said Court erred in sustaining the motion of the defendants in error to dismiss said cause.

Sixth.—Said Court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient.

Eleventh.—Said Court erred in holding that proper offers for said property were not made.

"*Twelfth.*—Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree."

The Court of Appeals entered its order in the case (Record, page 311), which contains the following:—

"This cause came on to be heard upon the petition in error, bills of exceptions, original papers and pleadings and the transcript of the record in the Court of Common Pleas and was argued by counsel and submitted to the Court; on consideration whereof the judgment of said Court of Common Pleas is affirmed."

Thereafter plaintiff filed its petition in error in the Supreme Court of Ohio (Record, page 315). In the first paragraph of this petition in error we find the following:—

> "A transcript of the docket and journal entries, whereof the bill of exceptions and such other original papers as are necessary to show the errors complained of, are filed herein."

The alleged constitutional questions are suggested in this petition. We also find the following:—

> "*Sixth.*—Said Court erred in holding that the evidence did not show that plaintiff in error proved inability to agree.
>
> "*Twelfth.*—Said Court erred in holding that the description of the property which plaintiff in error sought to condemn was insufficient."

The order of the Supreme Court of Ohio entered in the case (Record, page 319), has been quoted in full above, page 4.

The alleged Federal question arises out of Point 2 mentioned above, to wit:—

> "2. Its right to make the appropriation."

Plaintiff claims that under its charter it has a contract or property right in the bed of Cuyahoga River between the points designated as the location for its water power development and that this contract or property right was made more definite and specific by its plan of development adopted and approved by resolutions of its board of directors. Plaintiff further claims that defendants have, in force and effect, impaired its contract and deprived it of its property without due process of law in that, under their several charters, they have constructed a hydro-electric and steam power plant in the valley of the Cuyahoga River

within the points designated in the plaintiff's charter and have asserted a claim that these developments, being devoted to a public use, cannot be condemned by plaintiff, which claim the State Court has sustained.

For all of the purposes of this branch of the motion to dismiss, defendants may admit the full force of plaintiff's contention that a Federal question is presented. Even if this be true, it is none the less true and perfectly clear that the case presents other questions of a purely local character. The record shows that three purely local questions were presented and run all through the case. They are:—

First.—The question whether the plaintiff in fact complied with the statutory requirement that it must negotiate with the owner of the property which it proposes to condemn and must establish its inability to agree with the owner as to the compensation to be paid for the property before commencing condemnation proceedings.

Second.—The question whether the description of the property set forth by the plaintiff in its papers is a sufficient description within the meaning of the statute.

Third.—The question whether the plaintiff has satisfactorily shown the necessity for the appropriation.

Plaintiff undertook to prove that there had been negotiations for the purchase of the property before it commenced its proceedings to condemn and to show that it had been unable to agree with the owner of the property in regard to the compensation to be paid. Defendants endeavored to prove that plaintiff had been negotiating with the wrong parties, that they were fully advised that the property was owned by the Northern Ohio Traction and Light Company but failed to show any satisfactory evidence of inability to agree in regard to the compensation to be paid with any agents or representatives of that company. This point was expressly made the basis for the motion to dismiss, which was presented at the termination of the trial and which is quoted above (see Record, page 232).

If it be true that plaintiff's proof did not measure up to the standard required by the statute in regard to this question, it was a matter of no importance whether the plaintiff's contention in regard to the alleged Federal question is right or wrong. This statutory question is of itself quite sufficient to justify the decision of the State Court against the plaintiff and the record seems to show reasonably clearly that the trial Judge held with the defendants on this point. It appears that the motion to dismiss, which was expressly based upon this point, was sustained, and it further appears that plaintiff's writ of error filed in the Court of Appeals assigns as its first error that the Court erred in sustaining this motion to dismiss.

The sufficiency of the description of the property to be condemned and the necessity for the appropriation were both questions necessarily involved in the case. The burden of establishing both to the satisfaction of the Court rested with the plaintiff. The record shows two inconsistent plans of development. The first was presented by Roberts & Abbott under date December 29th, 1908, being plaintiff's Exhibit 19 (Record, pages 292-305). This plan involved the construction of two water powers, the upper and the lower. The upper was to be constructed higher up the stream than the property which plaintiff is endeavoring to condemn from defendants. The lower power was located on the stream below this property. The map which appears in the Record opposite page 304 shows the location of these two powers in red ink enclosing a star. The tract which plaintiff desires to condemn is shown in yellow lines on Defendants' Exhibit J, which is a map of "Milbank Park and Hydraulic Tract," and is the last of several maps following page 304 of the Record and immediately preceding page 305. The yellow lines are run at a distance of one hundred feet on each side of the center line of Cuyahoga River. Plaintiff fails to show any basis whatever for its effort to appropriate this long, narrow strip of land. The evidence does not show that the construction of the lower power would flood the land exactly one hundred feet on each side

of the center line of the river. It further appears that this strip of land includes the Northern Ohio Traction and Light Company railway bridge, a public highway bridge and other property which is not claimed by the plaintiff. As a matter of fact this Roberts & Abbott plan must have been abandoned for plaintiff at the trial presented a later plan as its plan of development. There were good reasons for abandoning this plan for in the "General Scheme" presented by the plan (Record, page 294) we find the following:—

> "The proposed dam is to be seventy feet in height and is to flood and displace five existing dams located in the village of Cuyahoga Falls, the upper one of which is located near the business center of the town."

Perhaps plaintiff found that there were other people who had interests in this river and that it would be difficult, and perhaps impossible, to eliminate their interests.

This later plan was prepared and presented by H. Von Schon, Consulting Engineer, under date December 29th, 1908 (Record, pages 249-282). It is explained by the map which appears opposite page 246 of the Record, and the general scheme is shown in that part of the plan which is printed on page 262 of the Record. It provides for the construction of the dam shown on the map as Gaylord Dam A above the village of Cuyahoga Falls and above the property which plaintiff is endeavoring in this proceeding to condemn from the defendants. Instead of flooding defendants' land it will withhold the water from it and back it up into the Brandywine. Another dam shown on the map as Mud Brook Dam B will keep the water from coming down the Brandywine into Mud Brook and the Cuyahoga River and force it down the Brandywine to a point on the north where a third dam, shown on the map as Brandywine Dam C is to be constructed, and from that point the water is to be taken through pipe lines cross country to the power station at Vaughan and discharged into the river at that point. The testimony (pages 40, 52, 239 and 245), shows very clearly that this Von Schon plan is plaintiff's plan of development.

Under this plan plaintiff does not need the tract of land which it is endeavoring to condemn in this case or any part of it. The development under this plan will, of course, damage this property, for it will deprive it of the ordinary flow of the river. No water will come below the Gaylord Dam except the seepage through the dam and in times of high water. Plaintiff has failed to show any basis whatever for its effort to condemn this property. It certainly will not be flooded, and there is no suggestion that any part of it is needed for the construction of dams, pipes or other structures which may constitute any part of plaintiff's proposed plant.

Under this Record it is very evident that some very important questions were presented for the determination of the trial Court as, for instance, proof of inability to agree, proof of sufficiency of description of the land which plaintiff is undertaking to condemn and proof of necessity to appropriate. All of these questions are purely local questions, and any one of them was quite sufficient to justify the decision of the Court denying plaintiff's claim of right to condemn, independent of any view that the Court might hold in regard to an alleged Federal question.

The decision of the State Court would have been the same if the property that plaintiff is undertaking to appropriate instead of being owned by a public service corporation and devoted to a public use was a farm owned by an individual and devoted to the growing of potatoes. The alleged Federal question did not control the decision, and on that account this Court is without jurisdiction to entertain this case.

The views of this Court upon motions to dismiss for want of jurisdiction, based upon the ground that the alleged Federal question did not control the State Court, have been expressed in a multitude of cases.

In State *vs.* Board of Liquidation of Louisana, 98 U. S. 140, the syllabus reads:—

> "It is not enough to give this Court jurisdiction over the judgments of the State Court if the record

should show that a Federal question was argued or presented to that Court for decision.

"It must appear that its decision was necessary to the determination of the cause and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

In Hale *vs.* Akers, 132 U. S. 554, the syllabus reads:—

"Where two defenses were made in the State Court, either of which if sustained barred the action, and one involved a Federal question and the other did not and the State Court sustained them both and gave its judgment for defendant, this Court will affirm the State judgment without considering the Federal question although it may have been erroneously decided."

These principles have been approved in a long line of decisions, including the following:—

Miller *vs.* Anderson, 150 U. S. 135;
Eustis *vs.* Bolles, 150 U. S. 362;
Arkansas Southern Railway *vs.* Griffith, 207 U. S. 275;
Gaar, Scott & Co. *vs.* Shannon, 223 U. S. 468;
Southern Pacific Co. *vs.* Schuyler, 227 U. S. 610;
Consolidated Turnpike Co. *vs.* Norfolk & O. V. R. Co., 228 U. S. 598;
Adams *vs.* Russell, 229 U. S. 354.

It seems inconceivable that plaintiff denies the soundness of this principle. In the brief filed on behalf of the plaintiff (page 20) an effort is made apparently to show that this case does not come within the scope of the above principle. The brief states that it is

"impossible to know the precise ground upon which the State Courts proceeded,"

but that plaintiff's Federal right must have been denied; and that

> "the only question before the Court was whether or not the plaintiff had a right to acquire the land that constituted a contract and property right;"

and that

> "the questions of corporate existence, right to appropriate, inability to agree and necessity for the appropriation, as well as the question as to the effect of the defendant's asserted devotion of the land to the public use, are but separate elements of that single ultimate question, *i. e.*, mere premises upon which the existence of the asserted Federal right is to be deduced."

Plaintiff apparently contends that it is a matter of no importance whether the State statutes require, as conditions precedent to the exercise of even an admitted right of eminent domain, that the plaintiff, undertaking to exercise that right, must first establish corporate existence, right to appropriate, inability to agree and necessity for appropriation. This position means, as stated on page 21 of plaintiff's brief:

> "In other words the Federal question was presented and must have been decided adversely to the plaintiff and the precise ground upon which the State Court based its denial is therefore immaterial."

Plaintiff overlooks the fact that the local questions are separate and distinct from the alleged Federal question and that the State Court might have held with the plaintiff on his alleged Federal question, and perhaps the Court of Appeals of Summit County did so hold, but the decision of that Court may have been, and perhaps was, based entirely upon any one or more of the local questions involved. Under these circumstances this Court will not take jurisdiction of the case.

Plaintiff relies apparently with confidence upon the following cases:—

Gaar, Scott & Co. *vs.* Shannon, 223 U. S. 468;
West Chicago Railroad *vs.* Chicago, 201 U. S. 506;
Cornell Steamboat Co. *vs.* Phoenix Construction Co., 233 U. S. 593;
St. Louis & Iron Mt. Railroad *vs.* McWhirter, 229 U. S. 265.

In each one of these cases the general principle cited above is fully recognized, but the Court held that the Federal question controlled the case and the decision of the State Court could not have been rendered without deciding it. It is along these lines, of course, that the present case is differentiated from the four cases last cited. The record gives reasonably satisfactory evidence that the State Court based its decision upon the purely local questions, although it may perhaps have also decided the alleged Federal question against plaintiff.

In order that a plaintiff in error may succeed in having this Court take and maintain jurisdiction of his case, the burden is upon him to establish that the Federal question which he alleges gives this Court a jurisdiction, controlled the decision of the State Court.

It is not necessary that the record should show that the decision of the State Court is based upon a purely local question in order to establish that this Court will not take jurisdiction. In cases where both local and Federal questions are presented and the record fails to show whether the decision is based upon one or the other, this Court will not resolve the case in favor of jurisdiction but, on the contrary, will refuse to take jurisdiction. Plaintiff in error must show by the record that the decision of the State Court was controlled by the Federal question, otherwise this Court will not take jurisdiction. This point was expressly ruled in State *vs.* Board of Liquidation of Louisiana, 98 U. S. 140, and in Hale *vs.* Akers, 132 U. S. 554, cited above, and the same point has been decided more recently in the other cases cited above, including particularly Adams *vs.* Russell, 229 U. S. 354.

III.

This Court has no Jurisdiction Because no Federal Question is Involved in this Case.

Plaintiff in error alleges that a Federal question is involved and on that account this Court has jurisdiction. For the purpose of considering this point we assume that the plaintiff is right in its contention that under its charter, followed by the adoption of its plan of development, it acquired a contract or property right in the lands located in the valley of the Cuyahoga River needed for its development purposes, and we place to one side the undoubted fact that other questions of a purely local character sufficient to justify the decision of the State Court were involved in this case.

The plaintiff contends that a Federal question is involved on two grounds; (1) that its contract has been impaired, and (2), that it has been deprived of its property without due process of law.

In considering the first branch of this inquiry, we meet at the threshhold the elementary proposition that in order to bring a case within the jurisdiction of this Court, on the ground that a contract has been impaired, it must be shown that it was impaired by some legislative action subsequent to the creation of the contract. In Central Land Company *vs.* Laidley, 159 U. S. 104, the syllabus reads:—

> "In order to come within the provision of the United States Constitution, which declares that no State shall pass any law impairing the obligation of contract, not only must the obligation of the contract have been impaired, but it must have been impaired by some act of the legislative power of the State and not by a decision of its judicial department only."

To the same effect are the following cases:—

Bacon *vs.* Texas, 163 U. S. 207;

Loeb *vs.* Columbia Twp. 179 U. S. 479;

National Mutual B. & L. Assn. *vs.* Vrahan, 193 U. S. 635;

Cross Lake Shooting & Fishing Club *vs.* Louisiana, 224 U. S. 632;
Ross *vs.* Oregon, 227 U. S. 155.

Plaintiff evidently feels the necessity of showing that its contract was impaired by something in the nature of an exercise of legislative power. It endeavors to meet this burden by the claim that when defendants presented to the trial Court the proposition that plaintiff could not condemn their land as it had been already devoted to a public use, defendants relied upon the right of eminent domain, which must necessarily be founded upon legislative grant. Plaintiff devotes a substanial part of its brief to a consideration of the nature and extent of the right of eminent domain.

If there has been any impairment of plaintiff's contract it has been accomplished by the Court's judgment and not as the result of any legislative action. The Court did not sustain the validity of any constitutional provision, or act of the Legislature, or municipal ordinance against plaintiff's claim that such legislation impaired its contract right. Plaintiff does not attack any act of legislation on the ground that it impairs its contract. The only legislation that has any bearing upon the rights of the parties in this branch of the controversy are acts under which the several parties were incorporated, and the acts conferring the right of eminent domain. Plaintiff does not attack the validity of any of these acts. Plaintiff's contention is that defendants by asserting that they had devoted to a public use these lands, which they had theretofore purchased and not acquired by condemnation, in effect based its defense upon the right of eminent domain, which must necessarily be founded on legislative grant. The defense that the property which plaintiff was endeavoring to condemn had already been devoted to a public use, does not involve the assertion of the right of eminent domain, but even if it did, nothing is presented in the nature of a legislative act subsequent to the creation of plaintiff's alleged contract which can answer the requirements of the above principle of law, the burden of which plantiff is endeavoring to satisfy.

The second branch of this inquiry presents the question whether plaintiff has been deprived of its property without due process of law. This position when analyzed resolves itself into a claim that the State Court, in which plaintiff prosecuted his proceedings to condemn defendants' lands, and which admittedly had jurisdiction to hear and determine the issues raised, decided those issues against plaintiff's contentions and plaintiff wants this Court to reverse the State Court's decision. Plaintiff had ample opportunity to be heard in support of his contentions in the State Court, in fact the proceedings were instituted by plaintiff.

As was said in the opinion in Grannis *vs.* Ordean, 234 U. S. 394:—

> "The fundamental requisite of due process of law is the opportunity to be heard. Louisville & N. R. Co. *vs.* Schmidt, 177 U. S. 230, 236, 44 L. ed. 747, 750, 20 Sup. Ct. Rep. 620; Simon *vs.* Craft, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836. And it is to this end, of course, that summons or equivalent notice is employed."

A situation similar to the one presented in this case was presented in Macdonald *vs.* Oregon R. & N. Co., 233 U. S. 266, where the railroad company endeavored to enjoin defendants from interfering with its right of way. It appeared that defendants had conveyed the right of way to the railroad subject to a condition that the road should be completed within a definite time and the condition was not performed. On this account the defendants claimed that the railroad company's title had been forfeited and that they were the owners of the right of way. The State Court found in favor of the forfeiture but, having jurisdiction of the case, held that as the road was at the time in operation and serving the public, the defendants should not be allowed to take possession of the right of way but should be awarded proper damages, and thereupon the Court awarded the damages to the defendants and the right of way to

the railroad company. The defendants contended that this decree deprived them of their property without due process. The basis of the decree was that the railroad company had the right of eminent domain. This presents the same question that plaintiff claims is presented in this case. This Court said:—

> "All the contentions as to Federal rights rest upon the assumption that the Court below denied due process of law when it entered the decree complained of and this is based upon the conception that the Court exceeded its jurisdiction and misconceived or wrongfully interpreted the evidence and thereby in effect, while recognizing the title of the plaintiffs in error, virtually deprived them of the right conferred by the State law of having a common law trial for the purpose of determining the questions that were required to be decided in the case by the exercise by the railroad company of the right of eminent domain, including, of course, the fixing of compensation to be paid for the taking and the damages incidental thereto. * * * It is elementary and needs no citation of authorities to show that the due process clause of the Fourteenth Amendment does not control methods of State procedure, or give jurisdiction to this Court to review mere errors of law alleged to have been committed by a State Court in the performance of its duties within the scope of its authority concerning matters non-Federal in character."

Plaintiff argues in his brief (page 77), that although it instituted proceedings to condemn this land, the result of the Court's judgment has been that plaintiff's contract right has been impaired and it has been deprived of its property without due process of law. The contract which plaintiff claims has been impaired and its property of which it claims it has been deprived without due process are its alleged right to condemn the defendants' land for its development

purposes. We have heretofore shown that plaintiff's claim that its contract has been impaired does not bring its case within the scope of the contract clause of the Federal constitution because the alleged impairment was not the result of subsequent legislation.

The only basis for the claim that plaintiff has been deprived of its property without due process is that under the Court's judgment plaintiff has received no compensation for the property which he alleges has been taken from him. Plaintiff apparently relies upon Chicago, B. & Q. R. Co. *vs.* Chicago, 166 U. S. 226, which holds that this Court has jurisdiction under the due process clause to review a decision of the highest Court of the State in a condemnation case where, although plaintiff in error was served with process and appeared, he was not awarded compensation for the taking of his property for public use. The Court held that the failure to pay or secure proper compensation amounted to denial of due process.

This authority might be in point if the defendants were condemning the plaintiff's property and secured a judgment in their favor without the award of any compensation to plaintiff for the property taken. This is not that kind of a case. The Court denied the plaintiff's right to condemn the defendants' property. It did not grant the defendant the right to condemn plaintiff's property without compensation. In this connection plaintiff has shown by its own testimony that even under the order of the State Court in this case no property has been taken from it. We have shown above that plaintiff presented to the trial Court the Von Schon plan of development as the plan which it proposed to carry out. That plan proposes the construction of the Gaylord dam at a point in the river above the land which plaintiff is endeavoring to condemn from defendants. The construction of that dam would cause damage to defendants for it would divert the ordinary flow of the river so that defendants would be deprived of their riparian rights. Under this plan of development plaintiff will not need the long, narrow strip of land one hundred feet wide on each

side of the center line of the river which it is endeavoring in this proceeding to condemn, in fact, it will not need any of the defendant's land at all. If defendants are willing to forego their right to enjoin plaintiff from consummating this plan on the ground that under the statutes of the State plaintiff has no right to divert the water of the river in the way contemplated by the plan, plaintiff, instead of needing any of the defendant's property, would be under the burden of paying damages to the defendants for depriving them of the ordinary flow of the river.

There is no doubt that the State had authority to authorize the courts to deny the right to condemn to any party where the property which said party proposes to condemn has already been devoted to public use. As a matter of fact this is a general principle of law and if it be true, as alleged by the plaintiff, that the State Court acted upon it in this case, it does not follow that a Federal question is presented. On the contrary plaintiff's position resolves itself into nothing more than a charge that the decision of the State Court was erroneous.

In DeBearn *vs.* Safe Deposit & T. Co., 233 U. S. 34, this Court said:—

> "Briefly speaking, it is to be observed that the error which in this and the previous cases underlies all the assumptions of Federal right arises from disregarding the distinction between a controversy as to whether the attachments were authorized by the law of the State and the contention as to the power in the State to have given authority to its courts to issue such attachments. The two are widely different, the one being concerned with what State action has been taken and the other with the power of the State to confer authority to take such action. Castillo *vs.* McConnico, 168 U. S. 674."

In Willoughby *vs.* Chicago, 235 U. S. 48, the second point in the syllabus reads:—

> "Whether the State could, not whether it did authorize the procedure followed below, is ordinarily the

only question open for consideration by the Federal Court under writ of error to a State Court which attacks the validity under the Federal Constitution of the assessment for benefits resulting from the widening of the street."

This case really falls within that class of cases where a motion to dismiss is sustained on the ground that the Federal question suggested is wholly frivolous and unsubstantial and not adequate to give jurisdiction.

Consolidated Turnpike Co. *vs.* Norfolk & O. V. R. Co., 228 U. S. 598.

Under the circumstances outlined above, and considering the case in the light most favorable to plaintiff, there is no basis for its contention that it has been deprived of any property without due process of law.

Plaintiff argues at length in its brief the following questions:—

1. That its property has been taken (pages 49-51).

2. That its property has been taken for a private use and by a dummy of the Northern Ohio Traction Company (pages 55-69).

3. That its property has been taken without the necessary condemnation proceedings for which the statutes of the State provide (page 70).

4. That property can be devoted to public use only by the State or some instrumentality exercising delegated legislative authority (page 92).

5. That the property has not been legaliy devoted to public use pursuant to the power of eminent domain (pages 101-108).

6. That the defendants have no right to condemn the land which they claim has been devoted to public use (pages 108-110).

7. That plaintiff has the right to condemn this land even though it has been devoted to public use (pages 111-123).

All of these questions are interesting, but there is not a Federal question in the list. They are all questions for the determination of the State Court and this Court has no jurisdiction to review its decision of any of them.

For the reasons hereinbefore set forth we respectfully submit that this motion to dismiss this writ of error or to affirm the judgment should be sustained.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
TOLLES, HOGSETT, GINN & MORLEY,
Attorneys for Defendants in Error.

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No. 342.

OCTOBER TERM, 1916.

IN THE

Supreme Court of the United States.

THE CUYAHOGA RIVER POWER COMPANY,
Plaintiff-in-Error,

AGAINST

THE NORTHERN REALTY COMPANY and THE NORTHERN OHIO TRACTION AND LIGHT COMPANY,
Defendants-in-Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANTS-IN-ERROR REPLY ON MOTION TO DISMISS OR AFFIRM.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
T. H. HOGSETT,
Attorneys for Defendants-in-Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916. No. 342.

The Cuyahoga River Power Company, Plaintiff in Error,

against

The Northern Realty Company and The Northern Ohio Traction and Light Company, Defendants in Error.

ERROR TO THE COURT OF APPEALS, EIGHTH DISTRICT, OF THE STATE OF OHIO.

BRIEF FOR DEFENDANT IN ERROR.

REPLY ON MOTION TO DISMISS OR AFFIRM.

Defendants in error (hereinafter called "defendants") filed a motion to dismiss for want of jurisdiction or to affirm and filed a brief in support of that motion. Plaintiff filed its brief in opposition to this motion and the motion was presented on April 16th, 1917. On April 23d, the Court ordered the cause on the summary docket and assigned it for hearing on May 7th, 1917.

In order that the Court may understand the history of the case, the following chronological statement of the facts is presented:—

NOVEMBER 24, 1897.

The Akron, Bedford and Cleveland Railroad Company secured a report on the water power at Cuyahoga Falls where the property, which plaintiff is endeavoring to condemn is located. (See defendants' Exhibit L, Record, page 143.)

DECEMBER 14, 1897.

The Akron, Bedford and Cleveland Railroad Company purchased this property and took title in the name of Henry A. Everett (see deed, Record, page 118). This property was purchased for the purpose of water power development. (See testimony of Fred S. Borton, Record, page 61.)

MAY 26, 1899.

Agreement of consolidation of Akron Traction and Electric Company with Akron, Bedford and Cleveland Railroad Company under the name of Northern Ohio Traction Company. (See defendants' Exhibit E, Record, page 202.)

NOVEMBER 12, 1902.

Articles of Incorporation of the Northern Ohio Traction and Light Company. (Record, page 141.)

DECEMBER 29, 1902.

Deed from Northern Ohio Traction Company to Northern Ohio Traction and Light Company. (Record, page 172.)

OCTOBER 8, 1906.

Resolution of the Board of Directors of the Northern Ohio Traction and Light Company looking to the development of the property. Work was done from time to time in the way of reports of engineers. (Testimony of C. F. Moore, Record, pages 67-68.)

1897 TO 1910.

Various taxes and other payments made from time to time by the Akron, Bedford and Cleveland Railroad Com-

pany and the Northern Ohio Traction Company on account of this property. (See testimony of Charles H. Lahr, Record, page 83.)

1908.

Plaintiff was organized and in December adopted the Von Schon plan of development. (Record, pages 249-282.)

FEBRUARY 25, 1910.

Resolution of the Board of Directors of the Northern Ohio Traction and Light Company to purchase fifty-seven additional acres of land and to construct the new power plant on this property. (Record, page 69.)

DECEMBER, 1910.

Active work commenced by the Northern Ohio Traction and Light Company in the construction of its plant on this property. (See testimony of W. H. Roberts, pages 90-91; also testimony of Charles Currie, Record, pages 77-78; also minutes of meeting of the board held December 30th, 1910, Record, page 69.)

DECEMBER 20, 1910.

Deed from Henry A. Everett to Northern Realty Company. (Record, page 122.)

JANUARY 20, 1911.

This suit was instituted against the Northern Realty.

JANUARY 31, 1911.

Deed from Northern Realty Company to Northern Power Company. (Record, page 147.)

FEBRUARY 24, 1914.

Deed from Northern Power Company to Northern Ohio Traction and Light Company. (Record, page 151.)

MARCH 20, 1914.

The trial of this case commenced in the Court of Common Pleas and Northern Ohio Traction and Light Company on its own motion was admitted as a party defendant.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

Plaintiff sued to condemn defendants' land. It lost in the trial Court, that is, the Court of Common Pleas of Summit County, Ohio, and lost again on writ of error to the Court of Appeals of Summit County. It took the case by writ of error to the Supreme Court of Ohio and again lost. Plaintiff has brought the case here by writ of error to the Court of Appeals of Summit County.

Plaintiff claims that this Court has jurisdiction on the ground that a Federal question is involved and that that question controlled the decision of the State Court.

Plaintiff was incorporated under the appropriate Incorporation Act of the State of Ohio to develop the water power of the Cuyahoga River between specified points. It claims that under its charter and the laws of the State of Ohio it has the right of eminent domain and that that right is a contract right and a property right and that this contract right has been impaired and that it has been deprived of this property right without due process of law. It appeals to this Court for protection under the contract impairment clause of the Federal Constitution and the due process clause of the Fourteenth Amendment.

The Act which plaintiff claims impairs its contract right and deprives it of its property without due process is the judgment of the State Court which denies plaintiff's right to condemn defendants' land. One of the defenses presented by defendants was that plaintiff could not condemn this land as they (defendants) had already devoted the property to a public use. Plaintiff claims that the judg-

ment of the Court denying its right to condemn was based upon this defense and that this defense was necessarily based upon an exertion of the legislative power of the State for the reason that no property, according to plaintiff, can be devoted to public use except by exercise of the right of eminent domain. Defendants did not acquire this property by condemnation, but purchased it. Plaintiff's contention, however, is that although the property was purchased by defendants, it could only devote it to a public use by exercise of the right of eminent domain, which it alleges is equivalent to an exertion of the legislative power of the State, and that this situation presents a case within the scope of the contract impairment clause of the Federal Constitution.

Plaintiff further claims that the judgment of the State Court in denying its right to condemn defendants' land deprives it of its property without due process, first, because no compensation is paid, and second, because its property has been taken for a use which plaintiff claims is not a public use but, on the contrary, is a private use.

Defendants' motion to dismiss or affirm presents the questions whether the writ of error was addressed to the right Court; whether the alleged federal question controlled the case; and whether any federal question is in fact involved.

The first question has already been fully ventilated in the briefs heretofore filed and we will have nothing further to say on that point in this brief. We will, however, have something to say on the other two questions in reply to the brief filed by plaintiff in opposition to defendants' motion to dismiss, that is:—

1. Did the alleged Federal question control the decision of the State Court; and

2. Is any Federal question involved in the case?

If the motion to dismiss is overruled, it will mean that there is a Federal question involved and that it controlled the decision of the State Court. On this hypothesis this Court will be called upon to consider the following two

questions which defendants contend are really separate and distinct local questions justifying and requiring this Court to sustain defendants' motion to dismiss, to wit:—

3. Did plaintiff show inability to agree with defendants before instituting this condemnation suit; and

4. Did plaintiff show any necessity for appropriating defendants' land?

The following propositions will also be presented:—

5. Plaintiff's right to condemn is not a right entitled to the protection of the Federal Constitutional Guarantees.

6. Had not defendant devoted this proverty to public use and, independent of all other questions, was not that a good defense?

ARGUMENT.

I.

Did the Alleged Federal Question Control the Decision of the State Court?

The alleged Federal question is fully stated above. There appears to be an important issue between the parties in regard to the real nature and scope of plaintiff's alleged Federal right. In the brief filed for plaintiff in opposition to defendants' motion to dismiss, plaintiff's contract right and property right are constantly spoken of as a Federal right. This right is plaintiff's right of eminent domain, which is based solely upon the State Constitution and statutes and plaintiff's State charter. There is nothing Federal about it, in and of itself. It is not founded in any respect upon the Federal Constitution or any Federal statute. It is distinctly a State right. It is none the less entitled to protection under both the contract impairment clause and the due process clause of the Federal Constitution. In order to establish the jurisdiction of this Court plaintiff must show that this State contract right has been

impaired, or that it has been deprived of this State property right without due process. The fact that the State refused to allow condemnation does not of itself establish that plaintiff's contract has been impaired or that it has been deprived of its property without due process. Plaintiff called defendants into the State Court and invoked the powers of that Court to enforce its right to condemn. Defendant did not deny the existence of plaintiff's right of eminent domain under its charter and the Constitution and laws of the State of Ohio, but did deny its right to condemn defendants' land. The burden was imposed upon plaintiff to show inability to agree as to the compensation to be paid for the property, also the necessity for the appropriation. Defendant further relied upon its own devotion to public use of the property which plaintiff sued to condemn. Suppose plaintiff had made no effort to show inability to agree and defendant had moved to dismiss on that ground and the trial Court had sustained that motion and the judgment of the trial Court had been affirmed? According to the plaintiff's argument, this Court could take jurisdiction on writ of error. Or suppose plaintiff at the trial had failed to show any necessity for the appropriation and defendant had moved to dismiss on that ground and that judgment had been affirmed? Or supppose that plaintiff had failed to *establish* the first point required by the statute, to wit, the existence of the corporation, although it was in fact regularly incorporated, or suppose that the service upon the defendants was defective? Is it possible that in any one of these cases this Court could take jurisdiction upon writ of error to the State Court? If the State Court decided the case against plaintiff on any one of the points mentioned, its judgment would not be an impairment of plaintiff's contract right, or deprive plaintiff of its property right without due process, although that judgment would necessarily deny plaintiff's State right to condemn defendants' land.

In plaintiff's brief in opposition to our motion to dismiss (page 33) counsel said:—

> "And the question of its right to make the appropriation is conceded to be Federal."

To sustain this statement reference is made to our brief on motion to dismiss (page 11). No such concession is made in our brief. Counsel evidently refers to the following statement which appears on page 11:—

> "The alleged Federal question arises out of point 2 mentioned above, to-wit, its right to make the appropriation."

We do concede that the alleged Federal question arises out of that point, for the alleged right to make the appropriation is defendants' alleged right to condemn, of which plaintiff claims it has been deprived without due process, because of the defense that defendant had already devoted this property to a public use. It is not true that we concede that plaintiff's alleged right of condemnation, or its alleged right to make the appropriation is a Federal question; in fact, we expressly deny that it has anything Federal about it. Plaintiff's claim that this right is a contract right and that it has been impaired raises the Federal question and plaintiff's further claim that this right is a property right and that it has been deprived of this property without due process raises a Federal question.

Many of the questions that are presented and argued in the briefs heretofore filed by plaintiff were considered and analyzed in the recent case of Enterprise Irrigation District, *et al. vs.* Farmers Mutual Canal Co. *et al.*, decided March 6th, 1917, Advance Opinions of April 15th, 1917, page 318. The case came from the Supreme Court of the State of Nebraska. Plaintiffs in error denied the right of a certain canal company to divert a certain amount of water into its canal from the North Platte River for purposes of irrigation. The Court said:—

> "Concisely stated, the assignments of error complain that the Supreme Court infringed the due process and

equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the State Board's decision, instead of holding that it was made without lawful notice or opportunity to be heard, and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

"Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the State Board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel in *pais* was well grounded. The first was plainly a Federal question and the other as plainly non-Federal. Both were resolved in favor of the canal company. The other questions, none of which was Federal, may be put out of view in this connection. Thus we are concerned with a judgment, placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it. Hammond *vs.* Johnston, 142 U. S. 73, 78, 35 L. ed. 941, 942, 12 Sup. Ct. Rep. 141; Eustis *vs.* Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Berea College *vs.* Kentucky, 211 U. S. 45, 53, 53 L. ed. 81, 85, 29 Sup. Ct. Rep. 33; Waters-Pierce Oil Co. *vs.* Texas, 212 U. S. 112, 116, 53 L. ed. 431, 433, 29 Sup. Ct. Rep. 227; Gaar, S. & Co. *vs.* Shannon, 223 U. S. 468; 56 L. ed. 510, 32 Sup. Ct. Rep. 236; Southern P. Co. *vs.* Schuyler, 227 U. S. 601, 610, 57 L. ed. 662, 668, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. It

has been so held in cases where the judgment was rested upon a Federal ground and also upon an estoppel. Pierce *vs.* Somerset R. Co., 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. Ct. Rep. 64; Lowry *vs.* Silver City Gold & S. Min. Co., 179 U. S. 196, 45 L. ed. 151, 21 Sup. Ct. Rep. 104, 21 Mor. Min. Rep. 113. But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See Moran *vs.* Horsky, 178 U. S. 205, 208, 44 L. ed. 1038, 1039, 20 Sup. Ct. Rep. 856; Creswill *vs.* Grand Lodge K. P. 225 U. S. 246, 261, 56 L. ed. 1074, 1080, 32 Sup. Ct. Rep. 822."

"And this is true also where the non-Federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question. Leathe vs. Thomas, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30; Vandalia R. Co. *vs.* Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130. But, where the non-Federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other State decisions of non-Federal questions. Murdock *vs.* Memphis, 20 Wall. 590, 635, 22 L. ed. 429, 444; Eustis *vs.* Bolles, 150 U. S. 369, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Leathe *vs.* Thomas, *supra;* Arkansas Southern R. Co. *vs.* German Nat. Bank, 207 U. S. 275, 52 L. ed. 201, 203, 28 Sup. Ct. Rep. 78."

The Court then considered the question of estoppel in *pais* presented in the case and held that it was undoubtedly an independent ground of the judgment. The Court further said:—

"In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel

is without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. * * * It is not urged, nor could it well be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment."

"The claim that the Court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State, and thereby infringed the due process and equal protection clauses of the Fourteenth Amendment, requires but brief notice. The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this Court to revise the decisions of the State Courts upon questions of State law. Sayward *vs.* Denny, 158 U. S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; Central Land Co. *vs.* Laidley, 159 U. S. 103, 112, 40 L. Ed. 91, 94, 16 Sup. Ct. Rep. 80; Castillo *vs.* McConnico, 168 U. S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. The questions presented, other than those relating to the validity of the State Board's adjudication, all turned exclusively upon the law of the State, and the State Court's decision of them is controlling. Preston *vs.* Chicago, 226 U. S. 447, 57 L. ed. 293, 33 Sup. Ct. Rep. 177; St. Louis & K. C. Land Co. *vs.* Kansas City, 241 U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; Old Colony Trust Co. *vs.* Omaha, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967."

In the case before us, the question whether the plaintiff proved inability to agree and the further question whether it proved necessity for the appropriation are just as separate and distinct from the alleged Federal question as was the question of estoppel in this Mutual Canal Company case. They are not in any sense so interwoven with the alleged Federal question as not to be independent matter, and they

are of sufficient breadth to sustain the judgment without any decision on the alleged Federal question. There is no basis for the suggestion that they are essentially arbitrary or mere devices to prevent a review of the alleged Federal question, and they have more than fair support by the record. Moran *vs.* Horsky, 178 U. S. 205 is cited in the above quotation in support of the proposition that where a Federal question is so interwoven with a non-Federal question as not to be independent matter, the jurisdiction of this Court is plain. The law is stated to that effect in the opinion, but the non-Federal defense in the case was laches, and it was held that this defense "is based on a ground independent of any Federal question. On this account the jurisdiction was denied, and the writ of error was dismissed.

The defense of laches was presented in Creswill, *et al.*, *vs.* Grand Lodge K. of P., 225 U. S. 248, which is also cited at the same place in the above quotation, and that defense was sustained by the State Court, but this Court reversed the judgment, as it found no evidence to sustain this defense. This Court said: "While it is true that upon a writ of error to a State Court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (*a*) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record, the resulting question of law is open for decision." Laches is undoubtedly an independent non-Federal question, but it must have some support in the evidence.

Res adjudicata is held to be an independent non-Federal question, Wood *vs.* Chesborough, 228 U. S. 673. In Arkansas S. R. Co. *vs.* German National Bank, 207 U. S. 273, the State Court directed judgment against the Railroad Company for delivering cotton without surrender of the bill of lading, basing its decision on a statute which plaintiff in error contended was unconstitutional as a regulation of interstate commerce, but also upon certain principles

of common law. This Court dismissed the writ of error as the latter basis for the judgment presented a separate non-Federal question.

The statute of limitations is held to be a separate non-Federal question, and even though there may be a Federal question involved this Court will refuse jurisdiction. Johnson *vs.* Risk, 137 U. S. 300. These cases might be multiplied indefinitely.

In Stanley *vs.* Schwalby, 162 U. S. 257, and in C. B. & Q. R. Co. *vs.* Illinois, 200 U. S. 580, there was no independent non-Federal question broad enough to justify the decision of the State Court, and the denial of the Federal right was based on a question of law. Therefore, both cases were reviewable in this Court.

Plaintiff's error consists in considering its right of condemnation itself as a Federal question involving as separate elements, but as parts of the right itself, the statutory preliminary conditions precedent, that is the existence of the corporation, inability to agree, necessity for the appropriation, and right to appropriate. The right to appropriate is the right to condemn. This does not include the other elements, or rather conditions precedent, to the exercise of the right, which are separate and independent questions. If it did, why should these other questions be mentioned. They are, all of them independent non-Federal questions.

Although the Mutual Canal Company case covers a number of questions that have been argued in the briefs in the case before us, it does not touch perhaps the most important point, which is that in our case no opinion was filed in any of the State Courts, so that we cannot know definitely whether the decisions in the State Courts were based on the alleged Federal question, or on some of the local questions presented in the Record. We are not left entirely in the dark in this matter for the Record shows the motion to dismiss for the reasons therein stated, made by counsel or the defendants at the end of the trial (Record, page 232), and the proceedings which follow that motion, all of which

are considered in our brief on motion to dismiss (pages 9-10). The principles adopted by this Court in cases of this kind are well understood. We agree with much that is said on this question in plaintiff's brief in opposition to our motion to dismiss (pages 25-32). In fact, we rely on all of the cases cited by plaintiff in these pages. It is quite clear that where the Record in the State Court shows that a Federal question and a non-Federal question were presented, but the decision of the Court does not show whether it was based upon either one or the other, and this Court is left to conjecture the basis of the decision and the two questions are not so intervoven that they cannot be separated and considered as independent and separate questions, this Court will examine the Record to see whether the non-Federal question is sufficient of itself to sustain the judgment of the State Court without reference to the Federal question and is a good and valid defense. We agree that this Court must determine this issue but, in determining whether the non-Federal question is a good and valid defense, this Court will not analyze and consider conflicting testimony on an issue of fact which is fairly presented by the Record. If the Record shows an issue of fact, and there is evidence to sustain the judgment of the State Court on the theory that it was based on the non-Federal question, this Court will refuse to take jurisdiction. If the Record presents a question of law in connection with a non-Federal question, this Court will examine to see whether the judgment of the State Court could be sustained on that basis.

The non-Federal questions presented in the present case are whether plaintiff proved inability to agree with defendant as to the compensation to be paid for the property, and whether plaintiff established necessity to appropriate the property. On the first question the Record shows very clearly that the plaintiff was advised of the fact that the property was owned by the Northern Ohio Traction and Light Company and yet, with this knowledge, commenced to negotiate with the Northern Realty Company for the purchase of this property on January 16th, 1911. On that

day plaintiff wrote two letters, each addressed to the Northern Realty Company, making two separate offers for the property, the first for an absolute purchase and the second with a reservation of an easement or privilege to the Northern Realty Company. These two letters appear as defendants' Exhibits C and D (Record, pages 199 and 200). The testimony of the witnesses Willis Bacon (Record, page 45), and Richard F. Palmer (Record, page 53), called by plaintiff, establishes that there was some discussion between the representatives of the plaintiff and the representatives of the Northern Realty Company between January 16th and 20th, 1911, the principle conference being held on January 20th, the day on which this suit was instituted. Plaintiff makes much of the fact that the witness, Charles Currie, who was the vice-president and general manager of the Northern Ohio Traction and Light Company, took some part in this discussion. Mr. Bacon was asked (page 47), whether he was talking to Mr. Currie because he represented the Northern Ohio Traction and Light Company, and he answered "No." Negotiations to purchase the land commencing on January 16th and ending on January 20th, and a petition in condemnation filed on the latter date shows that there was not very much time given to these negotiations, in fact not enough to have the question presented to and considered by the Board of Directors of either the owner, the Northern Ohio Traction and Light Company, or the holder of the legal title, the Northern Realty Company. This fact of itself may have impressed the trial Judge with sufficient force to have caused him to render judgment against the plaintiff.

In the brief filed for plaintiff in opposition to defendants' brief on motion to dismiss (page 48) counsel for plaintiff calls attention to the fact that although Mr. Currie was called as a witness for defendants, he was not asked a single question with respect to his conversation with Mr. Bacon. The burden of establishing inability to agree rested upon plaintiff. Mr. Currie was not only called as a witness by defendants, but was cross exam-

ined by plaintiff, and no questions were asked him in regard to these discussions or negotiations upon which plaintiff relies to establish its inability to agree in regard to the compensation to be paid for the land. In this condition of the evidence a decision by the State Court that plaintiff had failed to establish inability to agree would be fully justified. As suggested above, the attention of the trial Judge was expressly drawn to this particular question by the motion to dismiss, which appears at page 232 of the Record. Counsel for defendants asked the Court to dismiss plaintiff's petition

> "for the reason that there is no evidence proving that there was any attempt or failure to agree with the owner of the property before beginning the proceeding for the appropriation of the property described in the petition, and that the plaintiff has no right to appropriate the property described in the petition."

It is not clear whether counsel for defendants meant by the last part of his motion that for the reason mentioned, to wit, failure to prove any attempt or failure to agree, plaintiff "has no right to appropriate the property," or whether by the latter part of his motion counsel meant that under all of the evidence covering the several points of defense "plaintiff has no right to appropriate the property." It may be that this motion to dismiss should be construed to cover not only the defense that plaintiff had failed to prove inability to agree, but also had failed to prove necessity for the appropriation, and also that plaintiff had no right to appropriate because defendant had already appropriated the property to a public use. Whichever way this motion is construed, it is clear that the attention of the trial Judge was expressly called to this independent non-Federal question, to wit, whether plaintiff had established inability to agree. It is further clear that the record shows an attempt by plaintiff to prove inability to agree and an attempt by defendants to show that no sufficient effort had been made by plaintiff in this respect to

meet the requirements of the statute. This Court will not analyze and construe the evidence in a case of this kind. This Court will do no more than determine that this independent non-Federal question is broad enough to justify the decision of the State Court and is a good and valid defense, and that the trial Judge would have been justified, under the evidence presented, to sustain defendants' contention on this point.

On the other non-Federal question, to wit, necessity to appropriate, the record is perfectly clear. Under plaintiff's plan of development, defendants' property is not needed. Plaintiff proposes to construct the Gaylord Dam at a point on the river above defendants' property. This will injure defendants' property because it will deprive defendants of the ordinary flow of the river, but it does not appear that defendants' property will be needed for the construction of any of plaintiff's proposed improvements. In plaintiff's brief in opposition to our motion to dismiss (pages 53 to 55) counsel argues that as the construction of the Gaylord Dam will damage defendants' property by depriving it of the water, plaintiff is justified in condemning and, by that means, taking title to defendants' property, and that plaintiff's arbitrary description of the property which it is to take, that is, 100 feet on each side of the channel of the river, is justified. In this condition of the evidence it is perfectly clear that the decision of the trial Judge to the effect that plaintiff has failed to establish necessity to appropriate would be fully justified. We cannot know whether the Court based its judgment on this proposition but, in view of the fact that the evidence would have justified the judgment on that basis, this Court will not take jurisdiction on any theory that this independent non-Federal question was not a valid and good defense and sufficient to sustain the judgment.

On this branch of the case plaintiff relies apparently with confidence (brief in opposition to motion to dismiss, page 30), on Johnson *vs.* Risk, 137 U. S. 300. The syllabus reads as follows:—

"1. To give this Court jurisdiction to review a judgment of a State Court, it must appear affirmatively, not only that a Federal question was presented therein for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

"2. Where in a suit from a State Court there is a Federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this Court will take jurisdiction of the case.

"3. Where a defense in a State Court is distinctly made, resting on local statutes, this Court will not, in order to reach a Federal question, resort to critical conjectures as to the action of the Court in the disposition of such defense.

"4. Where in a suit in a State Court there is a Federal question, and also a ground under the State Statute of Limitations on which the judgment is sustainable, and it does not appear on which of the two grounds the judgment was based, this Court has no jurisdiction to review the judgment."

The Court said:—

"Was the defense of the Statute of Limitations so palpably unfounded that we must presume that the State Court overruled it?"

The non-Federal question raised a point of law under the Statute of Limitations and this Court examined that point of law to see whether it was well taken. This is vastly different from an examination by this Court of conflicting testimony upon a question of fact relating to an independent non-Federal question where the burden of proof rests upon

the plaintiff. In this case, at the end of the opinion, we also find the following:—

> "Inasmuch, therefore, as, if the Supreme Court of the State had sustained the defense of the Statutes of Limitation, we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the Federal question, or that its decision was necessary to the determination of the cause and that it was actually decided."

Plaintiff also relies on the leading case of Klinger *vs.* Missouri, 13 Wallace 257. We quote the following from the opinion in this case, which is the latter part of the quotation from the same opinion appearing on page 28 of plaintiff's brief in opposition to our motion:—

> "But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State Court based its judgment on the law raising the Federal question, and this Court will then take jurisdiction." (Citing a number of cases.)

In this case a juror was discharged counsel asking for his discharge, presenting two reasons, one Federal and the other non-Federal. The Judge discharged the juror, but did not specify whether he based his decision upon one point or the other. This Court held that it would not take jurisdiction in view of the fact that the non-Federal ground was a good and valid ground and the trial Judge might have discharged the juror on that ground.

Of course the issue is to what extent this Court will go in determining whether the non-Federal question is a

good and valid defense. Where a non-Federal ground involves a question of fact and there is fair support in the evidence and the Court may have rested its decision upon this ground, this Court will not take jurisdiction.

Plaintiff, in order to sustain its contention that in cases of this kind this Court will examine into and review the testimony in order to determine an issue of fact where there is conflicting evidence, cites a number of cases, including the following:—

> Kansas City S. R. Co. *vs.* C. H. Albers Commission Co., 223 U. S. 584;
> Cedar Rapids Gas Light Co. *vs.* Cedar Rapids, 223 U. S. 666;
> Creswill *vs.* Grand Lodge K. of P., 225 U. S. 246;
> Southern P. Co. *vs.* Schuyler, 227 U. S. 601;
> Bowe *vs.* Scott, 233 U. S. 658;
> Carlson *vs.* Curtis, 234 U. S. 103.

In each one of these cases the first question considered by this Court was whether a Federal question was presented. In no one of them was it suggested that, in addition to an alleged Federal question, a non-Federal question was presented. In each case this Court, having decided that a Federal question was presented, proceeded to consider to what extent it would examine the facts. In some of the cases the records showed findings of fact. As a general proposition

> "this Court does not sit to retry issues of fact thus heard and determined by the properly constituted tribunals of the State having jurisdiction of the subject." Portland R. L. & P. Co. *vs.* Railroad Commission, 229 U. S. 400.

but as stated in Kansas City S. R. Co. *vs.* C. H. Albers Commission Co., 223 U. S. 591:—

> "While it is true that upon a writ of error to the State Court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the Federal right set up by the unsuc-

> cessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

These authorities have no bearing upon the issue presented in this branch of this case. They do not sustain plaintiff's apparent contention that even upon the supposition that separate and distinct non-Federal questions are presented, this Court will examine conflicting testimony in order to reach its own conclusion on the question whether a decision on any such non-Federal question in favor of a successful party in the State Court was justified.

It seems reasonably clear that in cases where a Federal question and a non-Federal question are presented to the State Court, and the decision does not show the basis upon which the State Court entered its judgment or decree, this Court will determine whether the non-Federal question is broad enough to cover the case and justify the decision without reference to the Federal question and whether it is a good and valid defense; and in deciding that question, if a point of law is presented this court will consider it and determine whether it is "so palpably unfounded that we must presume that the State Court overruled it." (Johnson *vs.* Risk, 137 U. S. 300). But the Court will not review pure questions of fact although where a Federal right is denied by the State Court and the decision is based on a mixed finding of law and fact or where it is charged that there is no evidence to support the finding this Court will examine the evidence. Judged by the principles established by the authorities, the defense in this case of inability to agree and no necessity for the appropriation with the burden of proof resting upon the defendants, must be considered not only independent non-Federal questions, but broad enough to justify the decision and good and valid defenses.

II.

Is Any Federal Question Involved in this Case.

We concede, of course, that property cannot be taken from its owner for a public use without just compensation, nor can it be taken for a private use and, further, than an issue of this kind presents a Federal question of which this Court will take jurisdiction upon writ of error to the highest State Court if the question is properly presented.

Section 237 of the Judicial Code is analyzed by plaintiff in its original brief, page 3, into three propositions, which are, in fact, copied from the opinion of this Court in Columbia W. Pr. Co. *vs.* Columbia Elec. St. R. R. & P. Co., 172 U. S. 474. The first proposition is:—

> (1)—Where is drawn in question the validity of a treaty or statute of or authority exercised under the United States, and the decision is against their validity.
>
> Plaintiff does not contend that this case comes within this class. (See original brief, page 4.)
>
> (3)—Or where any right, title, privilege, or an immunity is claimed under the Constitution or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority.

Plaintiff claims that the present case comes within this class, but it seems reasonably clear that this is not true. The basis for plaintiff's contention in this regard is set forth on page 4 of its original brief, which contains the following:—

> "The denial of the plaintiff in error's right to acquire the land is a decision against the title, right, privilege or immunity specially set up and claimed by the plaintiff in error under the Constitution of the United States, and is thus within the third clause."

We have already shown that plaintiff's right of condemnation is not a title, right, privilege or immunity under the United States Constitution, but is based solely upon the Constitution and laws of the State of Ohio and its charter secured under those laws. That right may be entitled to protection under the contract impairment clause and due process clause of the Federal Constitution, but it is not a right based upon the Federal Constitution, although the plaintiff's right to protection is based on that Constitution. It seems quite clear that plaintiff's right, considered as a contract right, may be denied and in that sense impaired, but unless it can be shown that it is impaired by a subsequent act of legislation, plaintiff has no right to protection under the contract impairment clause of the Federal Constitution. Plaintiff's right, considered as a property right, may be denied and he may be deprived of it, but unless he has been deprived of it on some basis that evidences a lack of due process, he is not entitled to the protection of the Federal Constitution. For these reasons this third proposition, quoted above, has no application.

The second proposition is as follows:—

> "(2) Where is drawn in question the validity of a statute or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity."

Plaintiff contends that in this case there is drawn in question the validity of an authority exercised under the State of Ohio on the ground that it is repugnant to the Constitution, and that the decision is in favor of its validity. Plaintiff contends that the devotion to public use by defendant of the property in question is an exercise of an authority under the State; that it is an exercise of the right of eminent domain, and that the decision of the State Court is in favor of the validity of this authority. We contend that at this last point plaintiff's case breaks down. There

is nothing in the Record to show that the State Court sustained the validity of defendant's devotion of the property to public use. The burden is upon plaintiff to show that the case presents a decision of the State Court to that effect and there is nothing in the Record to sustain any such position.

In plaintiff's brief in opposition to our motion to dismiss, at pages 14 and 22, attention is called to our failure in our brief to mention plaintiff's suggestion that the Ohio Commission law must have been relied upon by defendant as a basis for its devotion of the property to public use, and that this act is a subsequent act of legislation, which in addition to the exercise of the right of eminent domain by defendant in devoting the property to public use, brings this case within the jurisdiction of this Court under the contract impairment clause of the Federal Constitution.

We did not mention this Ohio Commission Act for the reason that there is nothing whatever in the record to show any connection between it and defendant's devotion of the land to public use, and on that account we did not consider that the point required any answer. Plaintiff cites many cases in an effort to sustain its position that the exercise of the right of eminent domain is in the nature of a legislative act, and can properly act as a subsequent act of legislation within the requirement of the law relating to the contract impairment clause and justify the jurisdiction of this Court, but none of these cases sustain this position. We have heretofore discussed this question in our brief filed in support of our motion to dismiss.

III.

Did Plaintiff Show Inability to Agree with Defendants Before Instituting this Condemnation Suit?

This question has been pretty thoroughly ventilated under Point I, *supra*. We find difficulty in considering this question except as a separate and distinct non-Federal question. But if this Court should hold that a Federal question is in

fact presented and controls the case so that this Court has jurisdiction to hear and determine it on the merits, the point presented on this branch of the case is whether this Court will review the testimony where it expressly appears that this same testimony has been before the State Court and the question whether it establishes inability to agree was expressly presented to the State Court and that Court may have ruled upon that question in the light of this testimony. The State Court may, in fact, have determined that there was not time enough between January 16th and January 20th, 1911, either for the Realty Company, the nominal owner who held the legal title to the property, or the Traction and Light Company, the real owner, to have this question, that is, whether it or they would sell the property to the plaintiff, presented to and considered by their respective Boards of Directors. In this connection this same plaintiff lost its condemnation proceeding against certain other owners of lands in this same neighborhood for the reason that the "plaintiff's offers to purchase the lands of such other owners were invalid because such other owners were not given a sufficient time to consider them" (plaintiff's original brief, page 5). If this Court should refuse to sustain our motion to dismiss, we submit that our motion to affirm should be granted on this ground, to wit, that plaintiff failed to show inability to agree.

IV.

Did Plaintiff show any necessity for Appropriating Defendants' Land?

In considering this question upon the merits we refer to the argument presented in our brief in support of our motion to dismiss (pages 13-15). It seems very clear that under plaintiff's plan of development it will have no need for the property which it is endeavoring to condemn from defendants. A curious inconsistency is presented in the petition filed in the Circuit Court of Summit County where this suit was originally instituted (Record, pages 4-7),

and plaintiff's proof at the trial. In this petition (Record, page 5) we find the following:—

> "Plaintiff says that it is necessary and that it so deems it necessary in order to carry out the objects and purposes of this corporation that it shall appropriate, and it intends to appropriate, as a part of its right of way for the construction, maintenance and operation of its said system of dams, pole lines and power houses, canals, locks and raceways, and for the purpose of constructing, maintaining and operating thereon, a dam or dams across said river which will raise the water in the channel thereof on the lands hereafter described, and also a line of poles thereon along the banks of said river whereon to string wires or cables to convey electricity and such power houses and other necessary structures as may be required to carry out the purposes of its charter, the following de-described real estate, to wit:"

Then follows a description of the property which plaintiff proposes to condemn. On page 7 at the end of this same petition we find:—

> "Wherefore plaintiff asks that such steps may be taken as are authorized by law, whereby plaintiff will be enabled to appropriate the above described real estate for its uses, objects and purposes above set forth; that it may have a decree authorizing it to so appropriate said property," &c.

It would seem from these parts of the petition that plaintiff needed this property for dams and power houses and structures and pole lines and also that it was going to raise the water in the channel on these lands. Plaintiff's proof does not sustain these allegations. The testimony which is referred to on page 14 of our brief for motion to dismiss shows that plaintiff does not intend to construct any dam on this property or any power house or any other structure, and, in fact, does not propose to flood this land. Plaintiff's

plan involves the construction of the Gaylord Dam at a point higher up the stream. The construction of this dam instead of resulting in flooding defendants' land, or in any way making it necessary for plaintiff to possess defendants' land, will accomplish nothing except to deprive plaintiff of the ordinary flow of the stream. This follows because under the plan the water of the stream will not only be held back by this Gaylord Dam but, instead of being returned into the old channel of the stream below that dam, it is proposed to divert the water away from the old channel and into the Brandywine Basin. We suggested in our brief filed in support of our motion to dismiss that this would subject plaintiff to an action for damages by defendant based upon the diversion of the water from defendants' property. Plaintiff replies in his brief in opposition to our motion that, on this hypothesis, if plaintiff went ahead with its plan "without acquiring defendants' land it would be immediately stopped by injunction." This is presented as a reason in support of plaintiff's action to condemn the land itself, that is, plaintiff insists that it has the right to condemn the land in order that it might be relieved from an action for damages.

Plaintiff will be met with a much more serious action than one for damages if it undertakes to follow out the plan which has been adopted by its Board of Directors that is, the Von Schon plan, which involves the diversion of water from the channel of the Cuyahoga River into Brandywine Basin. There is no authority in the laws of the State of Ohio justifying any such diversion of water. The statute upon which plaintiff relies for its authority to carry its plan of development is Section 10128 of the Ohio General Code of 1910, which is quoted on pages 6 and 7 of plaintiff's original brief. This section authorizes plaintiff to enter upon private land for examination, surveying, &c., and provides that it

> "may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and

power house as well as the land overflowed, and for the erection of tanks, and reservoirs for the storage of water for transportation and the erection of stations along such line or lines and the erection of such building as may be necessary for the purposes aforesaid."

This language is quite sufficient for the ordinary hydro-electric development where a dam is constructed to hold back the water and raise the head and where the water passes through the appropriate machinery and returns to the channel of the same stream so that ripairain owners below the dam are not deprived of the ordinary flow of the stream. There is no authority in this language for diverting the water from any stream into the channel of another stream or basin and any riparian owner below the dam is authorized to enjoin any company acting under the authority of this section from any such diversion of water.

In defendants' brief sur motion to dismiss it was suggested that the description of the land which plaintiff proposed to condemn was not sufficient. Plaintiff in its brief in opposition to this motion calls attention to the fact that the sufficiency of the description had already been passed upon by the State Court (see plaintiff's brief in opposition to motion to dismiss, page 34). It is true that at an early stage of this litigation defendants raised the question whether the description of the property which plaintiff proposed to condemn was sufficient under the Ohio statute. This was before any proof was taken and the Supreme Court of Ohio held that the description was sufficient to describe a definite tract of land. The point to which we wish to call attention in speaking now of this description is that there is nothing in the record to justify a description which would include land one hundred feet wide on each side of the river. Why not make it two hundred feet, or only fifty feet. There is nothing to show any necessity for limiting the tract to one hundred feet on each side of the channel, nor in fact for extending the tract to that width. The evidence shows that the description is arbitrary and without any foundation of necessity.

It results from what has been said above that if the question whether plaintiff established necessity for the appropriation cannot be considered as an independent and separate local question, broad enough to justify the decision of the State Court as a valid and good defense, and on that account this Court overrules the motion to dismiss, there still remains the motion to affirm, and we submit that this motion should be granted on the ground that plaintiff has failed to establish any necessity whatever for appropriating defendants' land.

V.

PLAINTIFF'S RIGHT TO CONDEMN IS NOT A RIGHT ENTITLED TO THE PROTECTION OF THE FEDERAL CONSTITUTIONAL GUARANTEES.

It is not every right that is entitled to the protection of the contract impairment clause of the Federal Constitution or to the due process clause of that Constitution. We admit that easements are entitled to this protection. Plaintiff has cited several cases where the right in question was the franchise of a street railway company to construct and operate a line of railway on a city street. These franchise rights are easements and are of sufficient dignity to secure the protection of the Federal guarantees. The following are cases of this kind.

New York Electric Lines Co. *vs.* Empire City Subway Co., 235 U. S. 179;
Russell *vs.* Sebastian, 233 U. S. 195;
Grand Trunk Ry. Co. *vs.* South Bend, 227 U. S. 544;
Hamilton G. & C. Traction Co. *vs.* Hamilton & L. Electric Transit Co., 69 Ohio State, 402;
Louisville Trust Co. *vs.* Cincinnati, 76 Fed. 296;
Boise Water Co. *vs.* Boise City, 230 U. S. 85;
Owensboro *vs.* Cumberland Telephone Co., 230 U. S. 58.

Practically all of the cases cited by plaintiff on this branch of its case relate to easements.

A liquor license is unquestionably a right or privilege but it has been held many times that a liquor license is not entitled to the protection of the contract impairment clause or the due process clause of the Federal Constitution. See the following cases:—

Board of Excise *vs.* Barrie, 34 N. Y. 657 (1866);
Martin *vs.* State, 23 Neb. 371 (1888), 36 N. W. 554;
People *vs.* Flynn, 184 N. Y. 579 (1906), 77 N. E. 1194;
La Croix *vs.* Couirs, 50 Conn. 321 (1882);
Voight *vs.* Board of Excise, 59 N. J. Law (1896), 36 Atl. 686;
Cassidy *vs.* Macon, 133 Ga. 689 (1909), 66 S. E. 941;
Hermandez *vs.* State, not reported (1911), 135 S. W. 170;
Cassidy *vs.* Drake, 154 Ky. 25, 156 S. W. 1032;
State *vs.* Ross, 177 Mo. App. 223, 162 S. W. 702.

In Metropolitan Board of Excise *vs.* Barrie, 34 N. Y. 659, the Court, in discussing a liquor license, said:—

> "These licenses to sell liquors are not contracts between the State and the persons licensed giving the latter vested rights protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense."

A license to practice medicine comes in this same class. State Board *vs.* McCrary, 95 Ark. 511 (1910), 130 S. W. 544.

The right conferred upon railroads to consolidate with other railroads is also in this same class and is not entitled to protection against contract impairment or the due process clause.

Pearsall vs. *Great Northern Railway Co.*, 161 U. S. 646.

A public office is not such property. *Sumpter* vs. *State*, 81 Ark. 60, 98 S. W. 719.

See also the following cases:

People *vs.* Chicago, 242 Ill. 561, 90 N. E. 259;
State *vs.* Henderson, 145 Iowa 657, 124 N. W. 767;
Bonner *vs.* Belsterling, 104 Tex. 432, 138 S. W. 571;
Bowen *vs.* Russell, 272 Ill. 313, 111 N. E. 978, 980;
Atty. Gen. *vs.* Jochim, 99 Mich. 358, 58 N. W. 611;
State *vs.* Crumbaugh, 26 Tex. Civ. App. 521, 63 S. W. 925;
Moore *vs.* Strickling, 46 W. Va. 515, 33 S. E. 274;
State *vs.* Grant, 14 Wyo. 41, 81 Pac. 795.

The question presented is, therefore, whether the right to condemn is the same kind of a right as an easement or whether it is more analogous to a liquor license or a license to practice medicine.

There are a number of definitions of an easement in "Words and Phrases," Vol. 3. The first reads as follows:

> "An easement is a liberty, privilege or advantage which one may have in the land of another without profit."

It seems reasonably clear that a right to condemn is not an easement, but it is more analogous to the other rights mentioned which are not entitled to protection under the Federal Constitution. These views do not run counter to the decision in *Chesapeake & Ohio Canal Co.* vs. *Baltimore & Ohio Railroad Co.*, 4 Gill & Johnson 1, and other similar cases, where the issue presented was the respective rights of two similar corporations, each endeavoring to take the same property for its corporate purposes. In these cases the earlier right prevails, but the question whether the right of either company is entitled to protection under the Federal Constitution is not involved. Plaintiff seems to lay some stress upon the proposition that its right was prior in time and the statement appears in its brief that defendants con-

structed their improvements upon this property even after plaintiff had instituted this condemnation suit. As a matter of fact defendants' predecessor acquired this property before plaintiff was incorporated. This property was purchased by the Akron, Bedford and Cleveland Railway Company and conveyed at its request to Henry A. Everett, who held title for the company by deed dated December 14th, 1897. Plaintiff was not incorporated until the year 1908. The evidence shows that this property was purchased by defendants' predecessor for the purpose of developing power to be used for its corporate purposes. Reports of engineers upon the proper method of development were secured by defendants' predecessor and later, in the month of December, 1910, actual construction of defendants' power house was commenced and was well under way before this suit was instituted on January 20th, 1911. It is true that the title to the property was taken in 1897 in the name of Henry A. Everett, and that he conveyed it on December 20th, 1910, to the Northern Realty Company and that that company conveyed it on January 31st, 1911, to the Northern Power Company and the Northern Power Company conveyed it to the Northern Ohio Traction and Light Company on the twenty-fourth day of February, 1914. Although the Northern Ohio Traction and Light Company did not take the legal title until this later date, the record shows very clearly that the property has been owned by the Northern Ohio Traction and Light Company ever since it was organized, and by its predecessor company when it was purchased and title taken in the name of Henry A. Everett in 1897.

The defendants' ownership of the property therefore antedates plaintiffs' incorporation and right to condemn property for its corporate purposes and defendants' actual development of the property for its public use was begun before plaintiff commenced this condemnation suit. The issue presented on this branch of the case is whether, under these circumstances, plaintiff's right to condemn is of such a character that when it is denied, as it was by the judgment of

the State Court, he is entitled to appeal to this Court for protection under the Federal guarantees on the ground that his alleged contract has been impaired and that he has been deprived of his alleged property right without due process. We submit that plaintiff's right is not within any class of rights that is protected by the Federal Constitution.

VI.

Had not Defendant Devoted this Property to Public Use and, Independent of all other Questions, was not that a good Defense?

Defendant was duly incorporated under the laws of the State of Ohio as a Traction and Light Company and, under the statutes of that State, has the right of eminent domain. Plaintiff denies that defendant had any right to condemn this particular land for the construction of a power house and that, in the absence of such right of condemnation, defendant cannot withdraw this property from the right of plaintiff to condemn it. The statutes of Ohio conferring upon defendant the right to condemn property outside of municipalities are cited at page 109 of plaintiff's original brief, and it is there shown that defendant has the same right to condemn that is conferred upon steam railroads and that steam railroads have the right to appropriate land for

> "necessary sidetracks, depots, work shops, round houses and water stations, material for construction except timber," &c.

The right of condemnation conferred upon steam railroads is not limited to the right of way on which the tracks are constructed. They are authorized to condemn property for their other purposes, as, for instance, depots and work shops, round houses and water stations. Where the same right of condemnation is given to an interurban electric railway company the question presented is whether the Legislature did not intend to confer upon such companies the

right to condemn land for uses which are similar uses, where an electric interurban railway company is concerned, to the uses for which a steam railroad company needs depots, work shops, round houses and water stations. Does not a power house stand in the same relation to an electric interurban company that a work shop or a water station does to a steam railroad?

This question is a question of interpretation of a State statute conferring the right of eminent domain upon an electric interurban railway company. The State Court has passed upon this question adversely to the contention of plaintiff. Plaintiff contends, in order that he may maintain jurisdiction of this Court, that the State Court has held that defendants' use of this property is not a public use because it had not the right to condemn it. This means that, according to plaintiff's contention, the State Court has held that defendants did have the right to condemn this property. If that was the decision of the State Court, it must have been based upon the interpretation of this particular statute conferring the right of eminent domain upon electric interurban railway companies. Will this Court reverse a decision of the State Court upon the construction of a State statute and hold that an interurban electric railway company did not have the right of eminent domain under a State statute where the State Court has held that it did? This Court has held many times that it is bound by the decision of the State Courts in construing their own statutes and it has also held in many cases that where a State Court has held a use to be a public use, it will treat these decisions with very great respect as embodying the deliberate judgment and matured thought of the State Courts, although on this point this Court holds that it is not bound by the decisions of the State Court. See following cases:—

Fallbrook Irrigation District *vs.* Bradley, 164 U. S. 111;

Clark *vs.* Nash, 198 U. S. 361;

Strickley *vs.* Highland Boy G. M. Co., 200 U. S. 527;

Harston *vs.* Danville & W. R. Co., 208 U. S. 578;
Union Lime Co. *vs.* Chicago & N. W. R. Co., 233 U. S. 211;
O'Neill *vs.* Lima, 239 U. S. 250.

In Strickley *vs.* Highland Boy G. M. Co., 200 U. S. 527, the syllabus reads:—

> "The condemnation of a right of way across a placer mining claim for an aerial bucket line of a mining corporation cannot be said to be a taking of private property for private use in defiance of the United States Constitution, Fourteenth Amendment, if authorized by the construction given by the State Courts to the provisions of State legislation for the exercise of eminent domain in behalf of certain uses declared to be public."

Plaintiff further contends that even though defendant has devoted this property to a pubic use, it is none the less entitled to condemn it. This, again, is a question where this Court will follow the decision of the State Court.

We respectfully submit that our motion to dismiss for want of jurisdiction should be sustained, but that if that motion is overruled, then that the judgment of the State Court should be affirmed.

JOSEPH S. CLARK,
JOHN C. WEADOCK,
T. H. HOGSETT,
Attorneys for Defendants in Error.